Supreme Court, U. S.
FILED
FEB 18 1977
MICHAEL RODAK, JR., CLERK

In The

Supreme Court of the United States

October Term, 1976

No. 76-1200

ROGER CRIST, as Warden of the Montana State Penitentiary, Deer Lodge, Montana, and John Moe, as Sheriff of Missoula County, Montana, STATE OF MONTANA,

Appellant,

vs.

MERREL CLINE and L. R. BRETZ,

Appellees.

Appeal from the United States Court of Appeals for the Ninth Circuit

JURISDICTIONAL STATEMENT

MIKE GREELY
Attorney General of Montana

ROBERT S. KELLER
Special Assistant Attorney General

State Capitol
Helena, Montana 59601

Counsel for Appellant

COCKLE PRINTING CO., 1822 St. Mary's Ave., Omaha

TABLE OF CONTENTS

	Pages
Opinion Below	2
Jurisdiction	2
Questions Presented	4
Statement of the Case	5
The Questions Presented are Substantial	7
Conclusion	11
Appendix A—Court of Appeals Opinion	13
Appendix B—District Court Opinion	42
Appendix C—Notice of Appeal	54
Appendix D—Revised Codes of Montana 95-711	55

TABLE OF AUTHORITIES

Apodaca v. Oregon, 406 U. S. 404, 92 S. Ct. 1628, 32 L. Ed. 2d 184 (1972)	10
Benton v. Maryland, 395 U. S. 784, 89 S. Ct. 2056, 23 L. Ed. 2d 707 (1969)	7
Breed v. Jones, 44 L. Ed. 2d 346 (1975)	9
Bretz v. Sheriff, 539 P. 2d 1191 (1975)	5
Cunningham, et al. v. Montana, 406 F. Supp. 430 (D. Mt., 1975)	6
Downum v. U. S., 372 U. S. 734, 83 S. Ct. 1033, 10 L. Ed. 2d 100	7, 8

TABLE OF AUTHORITIES—Continued

	Pages
Dutton v. Evans, 400 U. S. 74, 76 (1970)	3
Illinois v. Sommerville, 410 U. S. 184 (1973)	8, 9
Johnson v. Louisiana, 406 U. S. 356, 92 S. Ct. 1620, 32 L. Ed. 2d 152 (1972)	10
McCarthy v. Zerbst, 85 F. 2d 640, 642 (CA 10, 1936)	8
Serfass v. U. S., 420 U. S. 377, 43 L. Ed. 2d 265 (1975)	7, 8
State v. Padilla, 483 P. 2d 549 (Ariz. 1971) 404 U. S. 1049 (1972)	9
United Gas Pipe Line Co. v. Ideal Cement Co., 369 U. S. 134 (1961)	3
U. S. v. Jorn, 400 U. S. 470 (1970)	8
Wade v. Hunter, 336 U. S. 684, 688 (1949)	8
Watson v. Employers Liability Assur. Corp., 348 U. S. 66 (1954); 348 U. S. 921 (1954)	3
Williams v. Florida, 399 U. S. 78, 90 S. Ct. 1893, 26 L. Ed. 2d 446 (1970)	10

STATUTES INVOLVED

Section 95-1711 (3) (d) R. C. M. 1947	3, 4
28 U. S. C. Sec. 1254 (2)	3
U. S. Ct. Rules 13 (2), 15	1

CONSTITUTION INVOLVED

Fifth Amendment to the United States Constitution	3, 4, 7, 10

In The

Supreme Court of the United States

October Term, 1976

No. .....

ROGER CRIST, as Warden of the Montana State Penitentiary, Deer Lodge, Montana, and John Moe, as Sheriff of Missoula County, Montana, STATE OF MONTANA,

Appellant,

vs.

MERREL CLINE and L. R. BRETZ,

Appellees.

Appeal from the United States Court of Appeals for the Ninth Circuit

JURISDICTIONAL STATEMENT

The Appellant, pursuant to United States Supreme Court Rules 13 (2) and 15, files this statement of the basis upon which it is contended that the Supreme Court of the United States has jurisdiction on a direct appeal to review the final judgment in question and should exercise such jurisdiction in this case.

OPINIONS BELOW

The United States Court of Appeals for the Ninth Circuit on November 19, 1976 decided and filed its written opinion, which is not yet reported. A copy of the opinion is attached to this Jurisdictional Statement as Appendix A. The above opinion reversed and remanded the prior judgment of the District Court, the opinion of which is reported in 406 F. Supp. 430 (1975), and attached to this statement as Appendix B.

———o———

JURISDICTION

After conviction on a charge of Obtaining Money by False Pretenses, Bretz and Cline filed Petitions for Writs of Habeas Corpus in the United States District Court for the District of Montana, Billings Division. On December 31, 1975 the Honorable James F. Battin denied the petitions. Notices of Appeal to the Ninth Circuit Court of Appeals were filed by Bretz and Cline in January 1976. That Court, on appeal, reversed the decision of the District Court.

The appeal herein is from a final judgment decided and filed by the United States Court of Appeals for the Ninth Circuit on November 19, 1976, which held that a second prosecution brought against appellees herein violated the double jeopardy clause of the Fifth Amendment to the United States Constitution. The Court concluded that federal law, not state statute, determined when jeopardy attaches and that therefore defendants-appellees had twice been placed in jeopardy despite the fact that under Montana law, Section 95-1711 (3) (d), Revised Codes of Montana, 1947, jeopardy did not attach in the initial prosecution.

The Supreme Court of the United States has jurisdiction to review by direct appeal the opinion complained of by the provisions of 28 USC Sec. 1254 (2).

The following decisions sustain the jurisdiction of the Supreme Court to review the opinion on direct appeal in this case. *Dutton v. Evans,* 400 U. S. 74, 76 (1970); *United Gas Pipe Line Company v. Ideal Cement Company,* 369 U. S. 134 (1961); *Watson v. Employers Liability Assurance Corp.,* 348 U. S. 66 (1954), rehearing denied 348 U. S. 921 (1954).

The paragraph of the statute of the State of Montana found to be in violation of the Fifth Amendment is:

Section 95-1711 (3) (d), Revised Codes of Montana, 1947.

> "The former prosecution was improperly terminated. Except as provided in this subsection, there is an improper termination of a prosecution if the termination is for reasons not amounting to an acquittal, and it takes place after the first witness is sworn but before verdict. Termination under any of the following circumstances is not improper:
>
> (i) the defendant consents to the termination or waives his right to object to the termination; or
>
> (ii) the trial court, in the exercise of its discretion, finds that the termination is necessary because:
>
> (A) it is physically impossible to proceed with the trial in conformity with law; or

(B) there is a legal defect in the proceedings which would make any judgment entered upon a verdict reversible as a matter of law; or

(C) prejudicial conduct, in or outside the courtroom, makes it impossible to proceed with the trial without manifest injustice to either the defendant or the state; or

(D) the jury is unable to agree upon a verdict; or

(E) false statements of a juror or voir dire prevent a fair trial."

The entire text of this statute is contained in Appendix D.

Notice of Appeal was filed with the Ninth Circuit Court of Appeals on December 13, 1976, a copy of which is contained in Appendix C.

QUESTIONS PRESENTED

1. Can Montana determine by statute that jeopardy attaches in a trial when the first witness is sworn, or must it conform to the Federal Procedural Rules which establish the swearing of the jury as the point at which jeopardy attaches?

2. Or, is Section 95-1711 of the Revised Codes of Montana, 1947, constitutional in light of the double jeopardy provisions of the Fifth Amendment to the United States Constitution?

3. Assuming that this Court were to hold that jeopardy attaches in state proceedings when the jury is sworn, does the doctrine of "manifest necessity" nevertheless require that a trial be held?

STATEMENT OF THE CASE

The Information No. 3921 in this matter was filed on October 3, 1974, in Lewis and Clark County, State of Montana, charging Bretz and Cline with the commission of nine felonies. On March 13, 1975, a jury was empanelled and sworn; no witnesses were sworn. The trial court then dismissed three counts for failure to state an offense, in that due to a typographical error, the date of commission read "1974" rather than "1973". (And, unfortunately, the Montana Criminal Code of 1973 took effect January 1, 1974, i. e., the charging statute was repealed on that date.) The state filed and the State District Court granted a motion to dismiss the remaining counts on April 4, 1975, before any witnesses were sworn; a second Information, No. 3963, alleging the commission of two felonies by Bretz and Cline was filed on the same day. Defendants' motions to dismiss on the grounds of double jeopardy were filed on April 25, 1975, and the State District Court denied them on May 1, 1975. Bretz filed a Petition for Habeas Corpus with the Supreme Court of Montana alleging double jeopardy. This was denied by that Court on July 23, 1975. *Bretz v. Sheriff*, (1975) 539 P. 2d 1191. On September 2, 1975, the Supreme Court denied a rehearing. A trial com-

menced in the State District Court of the First Judicial District on June 16, 1975, and on July 2, 1975 Bretz and Cline were found guilty of Obtaining Money by False Pretenses—one of the same counts that had been dismissed in the earlier proceeding by the trial court because of a typographical error.

Bretz and Cline filed Petitions for Writs of Habeas Corpus in the United States District Court for the District of Montana, Billings Division, and the matters were ordered consolidated with that of a similar petition filed by Clancy Cunningham. On December 31, 1975, the Honorable James F. Battin denied the petitions. *Cunningham, et al. v. Montana,* 406 F. Supp. 430 (D. Mt., 1975).

Notices of Appeal to the Ninth Circuit Court of Appeals were filed by Bretz and Cline on January 7 and 9, 1976 respectively. The matters were again consolidated. In their opinion filed November 19, 1976, the Court reversed the lower court ruling that the state statute did not control when jeopardy attached in the first proceeding and that under federal law the defendants had twice been placed in jeopardy in violation of the Fifth Amendment. The Court went on to reverse the other part of the lower court's decision which held that even if jeopardy had attached the doctrine of "manifest necessity" required that the trial be held. On December 13, 1976 the appellants herein duly filed their Notice of Appeal.

THE QUESTIONS PRESENTED ARE SUBSTANTIAL

Appellants submit that the judgment below presents substantial questions warranting the acceptance of this action. The Ninth Circuit Court of Appeals' opinion rules that it is constitutionally impermissible for the separate states to establish rules governing when jeopardy attaches which vary in any degree past the time established in the Federal Rules of Criminal Procedure. The Montana statute in question provides that jeopardy attaches when the first witness is sworn as opposed to the federal rule which uses the point at which the jury is sworn. Substantively speaking, the two rules are of little or no difference.

This Court has not previously addressed the issue now presented. There is no question but that Fifth Amendment rights apply to the states as incorporated in the Fourteenth Amendment. *Benton v. Maryland,* (1969) 395 U. S. 784, 23 L. Ed. 2d 707, 89 S. Ct. 2056. However, *Benton* did not hold that all states, Montana included, must follow the identical *procedures* as those set forth for use in federal courts in order to protect Fifth Amendment *substantive* rights in state courts.

Likewise, later Supreme Court cases have not had occasion to address themselves to this issue. *Serfass v. United States,* (1975) 420 U. S. 377, 43 L. Ed. 2d 265 concerned a *federal* district court—there were no state proceedings involved and the Court never addressed itself to the issue presently before this Court. *Downum v. U. S.,* (1963) 372 U. S. 734, 10 L. Ed. 2d 100, 83 S. Ct. 1033 did involve a question of double jeopardy arising after a jury was empaneled and sworn and before the first witness was

called. But *Downum* went to the question of "manifest necessity", for every case arising in Federal Courts assumes without question, that the Federal rule applies, i. e., jeopardy "attaches" after the jury is empaneled and sworn. Since *Downum* was a case where a jury had been sworn, but no witness called, *Downum* is cited for the authority for the rule. But *Downum* did not question the rule.

Serfass, supra, gets closer to the point, in an effort to determine if jeopardy had attached *before* a jury had been called,

> "As an aid to the decision of cases in which the prohibition of the Double Jeopardy Clause has been invoked, the courts have found it useful to define a point in criminal proceedings at which the constitutional purposes and policies are implicated by resort to the concept of 'attachment of jeopardy'. See *United States v. Jorn,* supra, at 480. In the case of a jury trial, jeopardy attaches when a jury is empaneled and sworn. *Downum v. United States,* 372 U. S. 734 (1963); *Illinois v. Somerville,* 410 U. S. 458 (1973). In a nonjury trial, jeopardy attaches when the court begins to hear evidence. *McCarthy v. Zerbst,* 85 F. 2d 640, 642 (CA 10 1936). See *Wade v. Hunter,* 336 U. S. 684, 688 (1949). The Court has consistently adhered to the view that jeopardy does not attach, and the constitutional prohibition can have no application, until a defendant is 'put to trial before the trier of the facts, whether the trier be a jury or a judge'. *United States v. Jorn,* supra, at 479.",

at p. 388. Significantly, jeopardy attaches, in a non-jury case, *after* the first witness is sworn.

In *U. S. v. Jorn* (1970), 400 U. S. 470, the Court held that jeopardy had already attached in a *Federal District Court* at a point in time after a witness had *already testified.* Again there was no mention of anything relevant to the issue presently before this Court.

In *Breed v. Jones* (1975), 44 L. Ed. 2d 346, the United States Supreme Court did not render any blanket holding to the effect that a state could not decide at what point jeopardy attached. The Court addressed itself to the issue of whether a juvenile court adjudication constituted a "trial"—thereby establishing double jeopardy due to a subsequent adult trial for the same offense. The Court addressed itself primarily to the unique nature of juvenile proceedings, and to the legal rights of juveniles, and concluded that such a proceeding was, in fact, like a trial—and jeopardy attached. Nowhere in the opinion does the court categorically assert that a state cannot determine at what point a trial commences. More interestingly, nowhere does the Court even attempt to impose any federal procedural rule upon the California juvenile courts. The sole concern in *Breed,* as it is in the instant case, is not whether federal *procedures* were followed, but: were federally-guaranteed *rights* violated. In *Breed,* a young man was, in fact, tried twice for the same offense and found culpable both times; in the instant case, Appellant was tried but one time.

Illinois v. Somerville, (1973), 410 U. S. 184 concerned a state trial in circumstances where jeopardy had clearly attached under a state rule which was the same as the federal rule.

In the case of *State v. Padilla,* 483 P. 2d 549 (Ariz. 1971), cert. den., 404 U. S. 1049 (1972), the exact issue involved here was directly addressed by the Arizona Supreme Court. They ruled in accordance with Montana's

position on this appeal. However, at that time this Court denied certiorari and thus the question remains without Supreme Court resolution.

With respect to other Amendments within the Bill of Rights, this Court has been careful to distinguish between *substantive rights* and *procedures*. For instance, in *Apodaca v. Oregon*, 406 U. S. 404, 92 S. Ct. 1628, 32 L. Ed. 2d 184 (1972) and *Johnson v. Louisiana*, 406 U. S. 356, 92 S. Ct. 1620, 32 L. Ed. 2d 152 (1972), this Court ruled that it was constitutionally permissible for the states to require less than jury unanimity for a conviction notwithstanding the fact that federal procedure requires a unanimous verdict.

Similarily, this Court has ruled that a state can provide for juries of less than twelve persons—again in contravention of existing federal rules. *Williams v. Florida*, 399 U. S. 78, 90 S. Ct. 1893, 26 L. Ed. 2d 446 (1970).

A question to be resolved then is whether the Fifth Amendment application to the separate states requires them to adopt federal procedures and that it is not enough that the state procedure preserves the constitutional objectives. From a practical standpoint a defendant receives no less protection under Montana's statute, and similar statutes in other states, than he would under the Federal rule since the swearing of the jury and the swearing of the first witness occur at nearly the same time.

It is submitted that the decision of the Ninth Circuit here being appealed represents an unprecedented and unnecessary restriction on the rights of the State of Montana to adopt criminal procedures at variance with federal

procedures as long as those procedures preserve the applicable constitutional objectives.

CONCLUSION

It is submitted that the questions raised herein are of vital importance, not only to Montana, but to many of the separate states. The questions submitted are substantial and present to this court far reaching issues of the most vital public importance that must be answered.

DATED: February 15, 1977.

Respectfully submitted,

Attorney General of the State of Montana

By /s/ Robert S. Keller

Special Assistant Attorney General

State Capitol
Helena, Montana 59601

Counsel for Appellant

Counsel for Appellees:

Charles F. Moses, Esq.
Box 1913
Billings, Montana 59103

W. W. Leaphart, Esq.
1 Last Chance Gulch
Helena, Montana 59601

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 76-1572

L. R. BRETZ,

Petitioner-Appellant,

vs.

ROGER CRIST, etc., et al.,

Respondent-Appellee.

No. 76-1169

OPINION

MERREL CLINE,

Petitioner-Appellant,

vs.

THE STATE OF MONTANA, etc., et al.,

Respondent-Appellee.

[November 18, 1976]

On Appeal from the Federal District Court, District of Montana, Billings Division

Before: CHAMBERS, Chief Judge, TUTTLE* and KILKENNY, Circuit Judges.

TUTTLE, Circuit Judge:

The tension between federalism and the doctrine of selective incorporation of Bill of Rights guarantees via the Fourteenth Amendment inevitably generates appeals such

---

* Honorable Elbert P. Tuttle, Senior Judge, U. S. Court of Appeals, Fifth Circuit, sitting by designation.

as this. Appellants contend that a second prosecution brought against them by the State of Montana violated the double jeopardy clause of the Fifth Amendment as applied to the states through the due process clause of the Fourteenth Amendment. In denying their petition for habeas corpus, following conviction at the second trial, the United States District Court for the District of Montana agreed with the state that state, not federal, law determines when jeopardy attaches and therefore under the controlling Montana statute appellants had not been put in jeopardy by the first prosecution; and, in the alternative, that federal standards for re-prosecution following a declaration of mistrial had been met. *Cunningham v. District Court,* 406 F. Supp. 430, 432-434 (D. Mont. 1975) (consolidated case).

I. A TALE OF TWO TRIALS

The evidence at the trial would justify finding that appellants Bretz and Cline concocted a fraudulent scheme to obtain workmen's compensation payments as beneficiaries of one Wampole, deceased. The plan's particulars were not illuminated on appeal, but it appears that appellants filed a claim with the Montana Workmen's Compensation Division, alleging that Wampole was an employee of Courtesy Mobile Home Transporting, Inc.; that he suffered a fatal injury in the course of his employment; and that they were entitled to benefits on his behalf. Appellants prepared and submitted three different documents to the Workmen's Compensation Division: a "Claim for Compensation;" an "Employer's First Report of Occupational Injury or Disease;" and a "Petition for Compromise Settlement." Based on these documents, the Division paid a settlement of $5400 to the appellants.

A. *The Charges.*

Claiming that Wampole had never been employed by Courtesy, and had not been fatally injured in the course of his alleged employment, the state filed a nine-count information on October 3, 1974. The state leveled the following charges against the appellants:

> (1) Count I contended that the entire scheme constituted grand larceny in violation of Rev. Code of Montana § 94-2701 (1) (1948), and specified that the offending conduct occurred between January 13, 1973 and February 19, 1974.
>
> (2) Count II also applied to the entire scheme, and maintained that appellants committed the crime of obtaining money and property by false pretenses in violation of Rev. Code of Montana § 94-1805 (1947). Due to a typographical error, however, the information specified that the offending conduct occurred between January 13, *1974* and February 19, 1974.
>
> (3) Counts III through VIII fragmented[1] appellants' conduct into three instances of preparing false evidence in violation of Rev. Code of Montana § 94-1703 (1947) and three instances of offering false evidence in violation of Rev. Code of Montana § 94-1701 (1947). Each of the three documents submitted by appellants to the Division anchored a pair of offenses. Thus, the "Claim for Compensation" was the basis for charges of preparing false evidence and offering false evidence

---

1 "There is probably some correlation between the slighting of [the interest of society in preventing the guilty from going unpunished] and the development of rules allowing a liberal splitting of offenses . . . when one slip may result in total immunity from prosecution . . . the temptation to multiply the number of bites at the apple may become irresistible." Note, **Double Jeopardy: The Reprosecution Problem,** 77 Harv. L. Rev. 1272, 1274 (1964); **see** Johnson v. Commonwealth, 201 Ky. 314, 256 S. W. 338 (1923) (each of 75 hands of poker a separate offense).

between the dates of February 5, 1973 and February 13, 1973 (Counts III and IV); the "Employer's First Report" was the basis for similar charges of criminal conduct during the period March 19, 1973 to March 22, 1973 (Counts V and VI); and the "Petition for Compromise Settlement" was the basis for similar charges of criminal conduct during the period January 30, 1974 to February 1, 1974 (Counts VII and VIII).

(4) Count IX returned to the entire scheme and alleged that the appellants' conduct amounted to presenting false proofs upon a policy of insurance in violation of REV. CODE OF MONTANA § 94-2202 (1947), the offending activity supposedly having occurred between January 13, 1973 and February 19, 1974.

B. *The First Prosecution*

The following facts are conclusively established by the record. On March 10, 1975, counsel for the state and for appellants answered ready in the state trial court. On March 12, 1975, before voir dire had been completed, the trial court granted the state's motion to dismiss Count IX of the information (presenting false proofs upon a policy of insurance). On March 13, 1975, a jury was impaneled and sworn. Before opening statements and before any evidence had been offered, the jury was excused as defense counsel presented several motions to the court. The most important of these motions sought to restrict the state's evidence to the allegations of the information. This tactical stroke was aimed at Count II (obtaining money and property by false pretenses): the information mistakenly charged that the conduct constituting this offense had occurred between January 13, *1974* and February 19, 1974, but the relevant statutory provision, REV. CODE OF MONTANA § 94-1805 (1947), had been repealed effective January 1, 1974.

The state resisted this attempt to excise Count II from its case, and on March 21, 1975, moved to amend Count II to correct the typographical error. On March 24, 1974, the trial court denied this motion and *sua sponte* dismissed Count II for failing to state an offense.[2] After the Montana Supreme Court declined to grant the state's petition for a writ of supervisory control, the state returned to the trial court and moved to dismiss the remaining counts in order to "file a new and different information." The trial court granted the motion for this "limited purpose" and discharged the jury on April 4, 1975.

C. *The Second Prosecution*

On the same day that the trial court dismissed the first information, the state filed a second, two-count information. Count I accused the appellants of grand larceny, and tracked the language of Count I of the original information. Count II charged them with obtaining money and property by false pretenses, and corrected the typographical error that had flawed the original information. A new jury was impaneled, appellants' motion to dismiss on grounds that the prosecution placed them twice in jeopardy was denied, and appellants were found guilty of obtaining money and property by false pretenses. After exhausting available state postconviction remedies, appel-

---

2 The district court's finding that Count II was dismissed at the defendant's request, 406 F. Supp. at 431, was clearly erroneous. The trial court acted sua sponte.

lants sought and were denied habeas corpus relief by the district court.

II. ATTACHMENT OF JEOPARDY

Before 1969, the Supreme Court employed different criteria to test the constitutional permissibility of reprosecutions by state and federal authorities. Even though double state trials might run afoul of Fifth Amendment barriers to federal reprosecutions, the Fourteenth Amendment was thought to pose no constitutional obstacle to state retrials unless the proceedings exposed the accused to "that kind of double jeopardy [which creates] a hardship so acute and shocking that our polity will not endure it." *Palko v. Connecticut*, 302 U. S. 319, 328 (1937).[3] In *Benton v. Maryland*, 395 U. S. 784, 794 (1969), however, the Supreme Court eschewed *Palko's* "approach to basic constitutional rights," and found "that the double jeopardy prohibition of the Fifth Amendment represents a fundamental ideal in our constitutional heritage, and that it should apply to the States through the Fourteenth Amendment." The question in *Benton* was whether an accused who successfully appeals a conviction may be reprosecuted not only for the offense of which he was convicted, *e. g., North Carolina v. Pearce*, 395 U. S. 711, 719-20 (1969) (no Fifth Amendment bar to state retrial on same charge when defendant appeals and wins reversal), but also for an offense of which he was acquitted at the first trial. Relying on federal precedents, the *Benton* court held that the acquittal could not be reopened, and based its derivative holding on the proposition that "[o]nce it is decided that a particular Bill of Rights guarantee is 'fundamental to the American scheme of justice,' . . . the same constitutional standards apply against both the State and Federal Governments." 395 U. S. at 795.

3 **Compare** Brock v. North Carolina, 344 U. S. 424 (1953) (retrial after mistrial declared to allow state to secure testimony of witness claiming privilege against self incrimination did not violate Fourteenth Amendment), **with** Gori v. United States, 376 U. S. 364, 369 (1961) (dictum) (declaration of mistrial to afford prosecution more favorable opportunity to convict violates Fifth Amendment); **and compare** Hoag v. New Jersey, 356 U. S. 464, 471 (dictum) (criminal collateral estoppel not required by Fourteenth Amendment), **with** Ashe v. Swenson, 397 U. S. 436, 445 (1970) (collateral estoppel "is embodied in the Fifth Amendment guarantee against double jeopardy)."

A. *A Question of Lawmaking Competence*

An arithmetical as well as constitutional precondition to being "subject for the same offense to be twice put in jeopardy of life or limb," U. S. Const. amend. v, is to be once put in jeopardy. Hence the theory of attachment of jeopardy, admittedly an attempt at reification, but nevertheless serving to signify that point in the state's efforts to secure a conviction when the interests protected by the double jeopardy clause are sufficiently implicated to warrant barring a second prosecution absent special countervailing considerations. If the state rule—that jeopardy does not attach until "after the first witness is sworn," Rev. Code of Montana, § 95-1711 (3) (d) (1947)—is controlling, then petitioners were never put in jeopardy by the first prosecution and their second trial *a fortiori* could not have contravened the constitutional command. *See Alexander v. Fogliani*, 375 F. 2d 733, 734 (9th Cir. 1967) (no double jeopardy violation where, because jury had not been impaneled, jeopardy could not have attached). But

if the federal rule—that jeopardy attaches when a jury is impaneled and sworn, *e. g., Downum v. United States,* 372 U. S. 734, 735-36 (1963)—is of constitutional dimension, then jeopardy attached at the first trial and unless the mistrial declaration was consonant with the "manifest necessity" doctrine, *see* Part III *infra,* the second trial was constitutionally impermissible. The threshold question is thus whether the federal attachment of jeopardy rule is a product of constitutional exegesis or simply a nonconstitutional consequence of the Supreme Court's supervisory power over federal courts and federal officials.

We reject at the outset the notion that while the double jeopardy clause constrains reprosecutions by the states, it countenances different constitutional applications in state and federal courts. To be sure, this double-barreled incorporation doctrine can claim its supporters,[4] but it has never commanded a majority of the Supreme Court. Each time the due process clause of the Fourteenth Amendment has been interpreted to encompass a particular guarantee of the Bill of Rights, the Court has explicitly reaffirmed the proposition that the same constitutional norms are to be employed in assessing the conduct of state and federal authorities. *E. g., Ker v. California,* 374 U. S. 23, 33 (1963) ("the standard of reasonableness is the same under the Fourth and Fourteenth Amendments"); *Malloy v. Hogan,* 378 U. S. 1, 11 (1964) ("the same standards must determine whether an accused's silence in either a federal or state proceeding is justified"); *Pointer v. Texas,* 389 U. S. 400, 406 (1965) (Sixth Amendment confrontation clause "is 'to be enforced against the States under the Fourteenth Amendment according to the same standards that protect those personal rights against federal encroachment'") (citation omitted). Read in the context of these and other landmark incorporation decisions, *Benton's* declaration that "the same constitutional [double jeopardy] standards apply against both the State and Federal governments," *Benton v. Maryland,* 395 U. S. 784, 795 (1969), and its determination that "the validity of [state] conviction[s] must be judged . . . under this Court's interpretation of the Fifth Amendment double jeopardy provision," 395 U. S. at 796, compel the conclusion that if the federal attachment of jeopardy rule is constitutionally mandated in federal courts, no different rule may be followed by state courts.

Neither the Court's application of the exclusionary rule nor the jury trial cases embarrass the Supreme Court's position that the coverage of selectively incorporated provisions of the Bill of Rights must be coextensive in state and federal tribunals. It is true that although the Fourth Amendment's prohibition of unreasonable searches and seizures was made applicable to the states in *Wolf v. Colorado,* 338 U. S. 25 (1949), the Supreme Court delayed full enforcement of the federal exclusionary rule, *see Weeks v. United States,* 232 U. S. 383 (1914), against the states for another twelve years. *See Mapp v. Ohio,* 367 U. S. 643 (1961); *cf. Elkins v. United States,* 364 U. S. 206 (1960) (evidence illegally obtained by state officials may not be used in federal prosecutions). Recent Supreme

---

4 See, e. g., Ludwig v. Massachusetts, 44 U. S. L. W. 5173, 5177 (U. S. June 30, 1976) (Powell J., concurring) (jury trial); Baldwin v. New York, 399 U. S. 66, 76-77 (1976) (Burger, C. J., dissenting) (same); Duncan v. Louisiana, 391 U. S. 145, 213 (1968) (Fortas, J., concurring) (same).

Court decisions, however, demonstrate that the exclusionary rule is a "judicially created remedy designed to safeguard Fourth Amendment rights generally through its deterrent effect, rather than a personal constitutional right of the party aggrieved," *United States v. Calandra,* 414 U. S. 338, 348 (1974); *accord, United States v. Peltier,* 422 U. S. 531, 538-39 (1975). The Court's holding in *Stone v. Powell,* 44 U. S. L. W. 5313 (U. S. July 6, 1976), that a state prisoner afforded an adequate opportunity to contest the admission of illegally seized evidence at his state trial is not entitled to federal habeas corpus consideration of such a claim, confirms that the exclusionary rule, while constitutionally inspired, is not constitutionally required. Thus the hiatus between *Wolf* and *Mapp* gives us no pause: because the exclusionary rule is not constitutionally required—that is, it forms part of "a substructure of substantive, procedural and remedial rules . . . a constitutional common law subject to amendment, modification, or even reversal by Congress"[5]—its belated application to the states exposes no flaw in the Court's selective incorporation doctrine.

The state misreads *Williams v. Florida,* 399 U. S. 78 (1970), and *Apodaca v. Oregon,* 406 U. S. 404 (1972), as encouraging respect for state "procedural" rules that leave the "substance" of federal constitutional rights intact. *Williams* held that a state need not provide a 12-person jury in order to comply with the jury trial requirements of the Sixth Amendment. In *Apodaca,* a plurality of four Jus-

5 Monaghan, **The Supreme Court, 1974 Term—Foreword: Constitutional Common Law.** 89 Harv. L. Rev. 1, 2-3 (1975).

tices maintained that when a state dispenses with the unanimity requirement, it does not scuttle the *Duncan*-incorporated jury trial guarantee. The crucial point, however, is that the *Williams* majority and the *Apodaca* plurality treated the 12-person and unanimity requirements, respectively, as non-constitutional rules in federal as well as state courts.[6] That is, neither requirement was termed a *sine qua non* of the jury trial right protected by the Sixth Amendment in federal courts, and thus neither—under established incorporation doctrine—was found to be indispensable in state proceedings.

B. *Constitutional Status of the Attachment of Jeopardy Rule*

The attachment of jeopardy rule performs a crucial service in double jeopardy jurisprudence, but its office is confined to the mistrial context. When the question is whether an accused is threatened with double punishment,[7] whether two trials focus on the "same offense,"[8] whether

6 Williams v. Florida, 399 U. S. 78, 79 (1970) ("the 12-man requirement cannot be regarded as an indispensable component of the Sixth Amendment"); Apodaca v. Oregon, 406 U. S. 404, 406 (1972) (unanimity requirement is "not of constitutional stature").

7 See, e. g., Ex parte Lange, 85 U. S. (18 Wall.) 163 (1874).

8 See, e. g., Abbate v. United States, 359 U. S. 187 (1959) (federal government may prosecute after state has convicted defendant); Bartkus v. Illinois, 359 U. S. 121 (1959) (state may prosecute after acquittal in federal trial); Waller v. Florida, 397 U. S. 287 (1970) (state may not prosecute individual for same offense for which he has been prosecuted in municipal court); Ashe v. Swenson, 397 U. S. 436 (1970) (collateral estoppel is requirement of Fifth Amendment double jeopardy clause).

government appeal amounts to second jeopardy,[9] or whether reprosecution after dismissal[10] or defendant's successful appeal[11] constitutes double jeopardy, attachment of jeopardy at some time during a former prosecution is not controverted. The issue in these types of cases is whether the particular additional punishment or procedure is a constitutionally prohibited second run through the gantlet. Many mistrial cases require a similar analysis, *see* Part III *infra*. On this appeal, however, we confront the question whether the first proceeding put appellants in jeopardy, for the state neither maintains that the second prosecution failed to put appellants in jeopardy nor suggests that the tantalizing but firmly rejected theory of "continuing jeopardy"[12] now be embraced to unite both proceedings as only one jeopardy.

---

9 **See, e. g.,** Kepner v. United States, 195 U. S. 100, 129-30 (1904) (no government appeal from verdicts or judgments of acquittal, no matter how erroneous their foundation in law or fact).

10 **See, e. g.,** United States v. Sisson, 399 U. S. 267, 288-90 (1970).

11 **See, e. g.,** United States v. Ball, 163 U. S. 662, 672 (1896).

12 Mr. Justice Holmes first advanced the continuing jeopardy theory, **see Kepner v. United States,** 195 U. S. 100, 134-35, (Holmes, J., dissenting), to justify government appeal after acquittal, but neither appeal after acquittal, nor the theory has been accepted by the Court, **see e. g.,** Green v. United States, 355 U. S. 184, 192-94 (1957); United States v. Wilson, 420 U. S. 332, 351-52 (1975). As an alternative to the untidy "waiver" theory, continuing jeopardy has served as a metaphor to explain why a defendant who appeals his conviction may be retried, **see e. g.,** Price v. Georgia, 398 U. S. 323, 326 (1970), but the Court currently deprecates both theories and finds retrial after defendant appeal to be justified by analysis of the "respective interests involved," Breed v. Jones, 421 U. S. 519, 534 (1975). For an attempt to structure a comprehensive set of double jeopardy rules around the continuing jeopardy concept, see Mayers & Yarbrough, **Bis Vexari: New Trials and Successive Prosecutions,** 74 Harv. L. Rev. 1 (1960).

Before *Downum v. United States,* 372 U. S. 735 (1963), the Supreme Court had no occasion to announce a rule governing the attachment of jeopardy, all previous mistrial cases had held that the declaration of mistrial was proper and that therefore retrial did not give rise to a cognizable double jeopardy claim, *see, e. g.,* note 27, *infra.* Leading Courts of Appeals cases did not observe an analytical distinction between situations when jeopardy attaches during the first proceeding and those in which a subsequent proceeding subjects the accused to a second jeopardy,[13] but the Supreme Court in *Downum* clearly perceived the issue as whether the facts justified retrial after a mistrial "although the jury impaneled for the first trial was discharged without reaching a verdict and without the defendant's consent." 372 U. S. at 736. Since the mistrial in *Downum* had been declared after the first jury was impaneled but before any evidence had been introduced, 372 U. S. at 741 (Clark, J., dissenting); *Downum v. United States,* 300 F. 2d 137, 139-40 (5th Cir. 1962), the case necessarily stands for the proposition that jeopardy attaches when a jury is impaneled. The Court explicitly adopted this reading of *Downum* in *Illinois v. Somerville,* 410 U. S. 458, 467-68 (1973), and *Serfass v. United States,* 420 U. S. 377, 388

---

13 **Compare** Cornero v. United States, 48 F. 2d 69 (9th Cir. 1931) (holding jeopardy attaches when jury is impaneled but finding "exceptions to this general rule as to what constitutes former jeopardy") **and** Himmelfarb v. United States, 175 F. 2d 924, 932 & n. 2 (9th Cir. 1949), **cert. denied,** 338 U. S. 860 (1949) ("in numerous circumstances either the jeopardy attaching when the jury was sworn didn't count or didn't attach when the jury was sworn"), **with** Downum v. United States, 300 F. 2d 137, 139-40 (5th Cir. 1962), **rev'd,** 372 U. S. 734 (1963), (suggesting jeopardy might not attach if no evidence introduced but nevertheless requiring a "sound reason" for termination of proceedings after jury has been impaneled).

(1975). *Cf. United States v. Sisson,* 399 U. S. 267, 302-03 (1970) (statutory construction: phrase "put in jeopardy" of Criminal Appeals Act "confines the Government's right to appeal . . . to situations in which a jury has not been impaneled").[14]

We hold that the attachment of jeopardy rule applied in *Downum, Somerville* and *Serfass* is a constitutional requirement of the Fifth Amendment which is binding on the states as well as the federal government. The rule itself serves as the lynchpin for all double jeopardy jurisprudence. *Serfass v. United States,* 402 U. S. 377, 393 (1975) ("fundamental principle that an accused must suffer jeopardy before he can suffer double jeopardy"); *Illinois v. Somerville,* 418 U. S. 458, 467-68 (1973) ("the conclusion that jeopardy has attached begins . . . the inquiry. . . . Only if jeopardy has attached is a court called upon to determine whether the declaration of a mistrial" comports with the double jeopardy clause). Justice Harlan writing for the Court in *United States v. Jorn,* 400 U. S. 470 (1971),[15] clearly indicated the constitutional stature of the rule: "the conclusion that 'jeopardy attaches' when the trial commences expresses a judgment that the constitutional policies underpinning the Fifth Amendment's guarantee are implicated at that point in the proceedings." 400 U. S. at 480. The Chief Justice's opinion in *United States v. Serfass,* 420 U. S. 377 (1975), buttresses our conclusion: "the

---

14 **Accord,** United States v. Olsen, 504 F. 2d 1222, 1224 (9th Cir. 1974) ("Since no jury had been empaneled and sworn, jeopardy had not attached.")

15 The Chief Justice joined Justice Harlan's plurality opinion. See 400 U. S. at 487.

courts have found it useful to define a point in criminal proceedings *at which the constitutional purposes and policies are implicated* by resort to the concept of 'attachment of jeopardy,'" 420 U. S. at 388 (emphasis supplied).

The Supreme Court has consistently applied the federal attachment of jeopardy rule to state cases. In *Illinois v. Somerville,* 410 U. S. 458 (1973), the Court unhesitatingly turned to the federal rule as the first step in a two-step analysis to determine (1) when jeopardy attached and (2) whether subsequent proceedings amounted to a second jeopardy. *See* 410 U. S. at 467-68. Montana points out that the federal and state attachment of jeopardy rules in *Somerville* were identical. *See, e. g., People v. Somerville,* 88 Ill. App. 2d 212, 232 N. E. 2d 115, 117 (Ill. App. 1967), but this erroneously equates a circumstance with a dispositive factor in a Supreme Court opinion. The *Somerville* Court never mentions the state rule, and a thorough sifting of the opinion fails to discover even a shard of evidence suggesting that the Court did not consider federal standards controlling.

Breed v. Jones, 421 U. S. 519 (1975), resolves any doubt that federal standards determine when jeopardy attaches. In *Breed,* a unanimous Court ruled that a juvenile may not be tried as an adult for violation of a criminal statute when the alleged violation has previously been the basis for a juvenile court's adjudicatory determination of delinquency. The state contended that jeopardy had not attached during the juvenile court proceedings. 421 U. S. at 527. Despite a statute authorizing transfer and trial in the adult division after an adjudication of delinquency—a state rule that jeopardy did not attach in juvenile court—

the Supreme Court applied federal standards in deciding whether and when jeopardy attached, 421 U. S. at 528-31.[16]

Montana correctly urges that *Breed v. Jones* did not "baldly assert that a state cannot determine at what point a trial commences," and argues that no constitutional violation occurred here because under the Montana statute appellants were "tried but one time." Brief for Appellees at 7. But the circularity of the argument is palpable, and the reliance on *Breed* transmutes literal facts into constitutional finding. Montana neglects to point out that *Breed* also rejected—on federal constitutional grounds—the state law doctrine that the adult division trial merely "continued" the juvenile jeopardy. 421 U. S. at 532-35. If the constitutional protection against double trials as well as double punishments[17] is not to be circumvented, federal law must be authoritative in defining when the first trial begins as well as when it ends, *i. e.*, when the accused is first put

---

16 There is an indication in the Court of Appeals opinion that the state may have conceded that jeopardy attached during the juvenile proceedings, see Jones v. Breed, 497 F. 2d 1160, 1166 (9th Cir. 1974), vacated and remanded, 421 U. S. 519 (1975), but it is clear that in the Supreme Court and in the federal district court, the state argued that jeopardy did not attach during the juvenile proceedings and, in the alternative, that the second trial did not constitute a second jeopardy but a continuation of the first proceedings, see Breed v. Jones, 421 U. S. 519, 532 (1975); Jones v. Breed, 343 F. Supp. 690, 692 (1972).

17 Although Ex parte Lange, 85 U. S. (18 Wall.) 163, 172 (1873), indicated in dictum that "[i]t is the punishment that would legally follow the second conviction which is the real danger guarded against by the constitution," it has been firmly established ever since United States v. Ball, 163 U. S. 662, 669 (1896), that the "prohibition is not against being twice punished, but against being twice put in jeopardy; and the accused, whether convicted or acquitted, is equally put in jeopardy at the first trial."

in jeopardy as well as when prior proceedings amount to former jeopardy. *See Breed v. Jones,* 421 U. S. 519, 534 (1975) ("the fact that the proceedings against respondent had not 'run their full course,' . . . within the contemplation of the California Welfare and Institutions Code . . . does not satisfactorily explain why respondent should be deprived of the constitutional protection against a second trial"); *Price v. Georgia,* 398 U. S 323 (1969) (state may not employ continuing jeopardy theory to abrogate constitutional rule that acquittal ends first jeopardy).

Illinois v. Somerville and *Breed v. Jones* leave little room for argument, although the cases do not contain unequivocal language specifying federal rules of decision in attachment of jeopardy cases. Montana thus claims that a distinguishable state decision,[18] as "the sole case on point," recognizes state responsibility for defining the attachment of jeopardy. To the contrary, our researches reveal that the three Courts of Appeals that have considered the question have held that the task of defining attachment of jeopardy is a federal constitutional task. In *United States ex rel. Somerville v. Illinois,* 447 F. 2d 733, 735 (7th Cir. 1971), *rev'd on other grounds,* 410 U. S. 458 (1973), the

---

18 State v. Padilla, 483 P. 2d 549, 533 (Ariz. 1971), cert. denied, 404 U. S. 1049 (1972), did hold that Benton "did not define what constituted jeopardy and we believe the States are still allowed a certain degree of discretion," in adopting an attachment of jeopardy rule similar to Montana's. The reasoning in Padilla, however, is conclusory and the case itself was decided before United States v. Jorn, Illinois v. Somerville and Breed v. Jones. Moreover, because the Arizona Supreme Court in Padilla held that the mistrial had been justified because a juror was "irrevocably committed" to leave the jurisdiction, see 483 P. 2d at 553-54, we doubt that the case's attachment of jeopardy rule can be considered as anything more than an alternative holding.

Seventh Circuit was presented with an argument identical to that made here, and ruled that federal, not state, law "is controlling on the issue as to when jeopardy attaches." Similarly, the Court of Appeals for the Third Circuit applied the federal rule to a state law case in *United States ex rel. Gibson v. Ziegele,* 479 F. 2d 773, 776 (3d Cir. 1973), *cert. denied,* 414 U. S. 1008 (1973). Finally, in *Smith v. Mississippi,* 478 F. 2d 88, 93 (5th Cir.) *cert. denied,* 414 U. S. 1113 (1973), the Fifth Circuit analyzed the double jeopardy claim of a state prisoner as follows:

> "the [state's] contention that petitioner was not 'put to trial' or was in no way prejudiced by the dismissal of the proceedings before testimony was presented has been decided adversely to it by the Supreme Court in *Downum . . . and Somerville. . . .* In both cases the Supreme Court held that jeopardy attached when the first jury was selected and sworn. The mere introduction of evidence has no spontaneous effect on a defendant which can be said to automatically charge him with an appreciable degree of insecurity once he had made the preparations for trial and selected those of his peers who will determine his fate."

Montana debates the comparative efficacy of the federal rule versus its own rule, relying on the belief of the Montana Supreme Court that there is "no substantial difference between the two rules," *State v. Cunningham,* 535 P. 2d 186, 189 (Mont. 1975). One must, of course, concede that line drawing—an unavoidable incident of judicial decision—"cannot be wholly satisfactory, for it requires attaching different consequences to events which, when they lie near the line, actually differ very little," *Duncan v. Louisiana,* 391 U. S. 145, 161 (1968). But to make the very difficulty of constitutional decisionmaking

a reason to disregard authoritative Supreme Court precedent is not a proposition to be considered. *See, e. g., Baldwin v. New York,* 399 U. S. 66, 73-74 (1970) (state may not employ its own felony/misdemeanor classification, rather than federal potential sentence rule, to trigger jury trial guarantee despite similar results of the rules.)

Moreover, we question the accuracy of the Montana Supreme Court's view that there is "no inherent merit in the federal rule over Montana's state law," *State v. Cunningham,* 535 P. 2d 186, 188 (Mont. 1975). *Cunningham* incorrectly proceeds on the assumption that the attachment of jeopardy rule is designed to prevent prosecutorial manipulation. 535 P. 2d at 188-89. But as the Montana Supreme Court recognized, the trial court's correct application of mistrial doctrine, *see* Part III *infra,* is the only effective safeguard against prosecutorial overreaching. 535 P. 2d at 188-89. The attachment of jeopardy rule addresses different concerns: (1) protecting the accused from the financial, physical and psychological enervation worked by repetitive prosecutions;[19] and (2) preserving the accused's "valued right to have his trial completed by a particular tribunal, . . . *independent of the threat of bad-faith con-*

---

19 The classic quotation is from Mr. Justice Black's opinion for the Court in Green v. United States, 355 U. S. 184, 187-88 (1957):

> "The underlying idea, one that is deeply ingrained in at least the Anglo-American system of jurisprudence, is that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty."

duct by judge or prosecutor."[20] We decline to substitute a contradictory state rule for the Supreme Court's judgment that these concerns reach constitutional critical mass when the jury is impaneled and sworn.[21] And if preventing misconduct were the main purpose of the rule, a concern for prophylaxis would favor the federal formulation—it cannot be denied that the federal rule, which provides for earlier attachment, lessens the potential for misfeasance.

---

20 United States v. Jorn, 400 U. S. 470, 484-85 (1971); accord, United States v. See, 505 F. 2d 845, 851 (9th Cir. 1974), cert. denied, 420 U. S. 992 (1975).

21 E. g., Serfass v. United States, 420 U. S. 377, 390-91 ("the constitutional policies underpinning the Fifth Amendment's guarantee are not implicated before that point in the proceedings at which jeopardy attaches. . . . This is by no means a mere technicality, nor is it a 'rigid, mechanical' rule. It is, of course, like most legal rules, an attempt to impart content to an abstraction.")

The Montana statute is nearly a verbatim adoption of the Model Penal Code provision governing improper termination of trial. See Model Penal Code § 1.08 (P. O. D. 1962). In the only ALI commentary on § 1.08, an earlier tentative draft noted the difference between the rule that jeopardy attaches in a jury trial when the jury is sworn, and the rule that jeopardy attaches in a bench trial when the first witness is sworn, but the reporter could find "no reason" for the difference. Model Penal Code, Comment to § 1.09, at 53 (T. D. No. 5, 1956). The reporter, we believe, failed to recall that the Supreme Court has consistently recognized a major purpose of the double jeopardy clause as the protection of a defendant's "valued right to have his trial completed by a particular tribunal," Wade v. Hunter, 336 U. S. 684, 689 (1949); accord, United States v. Dinitz, 44 U. S. L. W. 4309, 4311 (U. S. March 3, 1976); Illinois v. Somerville, 410 U. S. 458, 469-71 (1973); United States v. Jorn, 400 U. S. 470, 484-85 (1971); Downum v. United States, 372 U. S. 734, 736 (1963). When one sees that the two attachment of jeopardy rules are necessary if this "valued right" is to be protected, the reason for the distinction seems plain.

III. RETRIAL AFTER MISTRIAL

Preconstitutional courts in America and England offered protection against double jeopardy only to defendants who had been pursued to the point of a final judgment or verdict. Whether the framers envisioned the double jeopardy clause as affording a broader protection against reprosecution after prematurely terminated trials is not disclosed by available historical evidence.[22] Thus it is not surprising that in *United States v. Perez*, 22 U. S. (9 Wheat.) 579 (1824), Mr. Justice Story treated the first mistrial case to reach the Supreme Court as presenting questions of the general law of the United States rather than constitutional issues. *Perez* held that retrial was not barred when a court discharges a jury unable to agree on a verdict. In terms that later became the touchstone for constitutional analysis, Justice Story declared that "the law has invested courts of justice with the authority to discharge a jury from giving any verdict, whenever, in their opinion, taking all the circumstances into consideration there is manifest necessity for the act, or the ends of public justice would otherwise be defeated," and found "the security which the public have for the faithful, sound and conscientious exercise of this discretion," to rest "upon the responsibility of the judges, under the oaths of office." 22 U. S. (9 Wheat.) at 580.

A declaration of mistrial anticipates reprosecution, but as early as *Simmons v. United States*, 142 U. S. 148 (1891),

---

22 See United States v. Wilson, 420 U. S. 332, 342 (1975). Note, Double Jeopardy: The Reprosecution Problem, 77 Harv. L. Rev. 1272, 1273 & nn. 11-16 (1964).

an erroneously declared mistrial was viewed as creating a potential double jeopardy problem. *Simmons* and *Logan v. United States*, 144 U. S. 263 (1892), attached constitutional significance to *Perez*' delphic concepts of "manifest necessity" and "the ends of public justice," which are now firmly established as constitutional standards of review of mistrial cases, *see, e. g., United States v. Dinitz*, 44 U. S. L. W. 4309, 4311 (U. S. March 3, 1976); *Illinois v. Somerville*, 410 U. S. 458, 461 (1973). Since appellants were put in jeopardy at their first trial, *see* Part II *supra*, the remaining question on appeal is whether, under the *Perez* standards, the mistrial was declared in circumstances that permit reprosecution.

A. *The Legacy of Perez*

The rationale behind allowing retrial following mistrial rulings that meet the *Perez* standards—for any retrial exposes a defendant to double trials and also substitutes a new jury for that originally chosen—was outlined in *Wade v. Hunter*, 336 U. S. 684, 688-89 (1949):

> "The double jeopardy provision of the Fifth Amendment . . . does not mean that every time a defendant is put to trial before a competent tribunal he is entitled to go free if the trial fails to end in a final judgment. Such a rule would create an insuperable obstacle to the administration of justice in many cases in which there is no semblance of the type of oppressive practices at which the double jeopardy prohibition is aimed."

In administering the *Perez* test, the Court has been reluctant to resort to mechanical rules to resolve the conflict between a defendant's Fifth Amendment rights and

society's interest in full enforcement of the criminal law. Nevertheless, ever since Justice Story cautioned that the power to declare a mistrial should be employed only "under urgent circumstances, and for very plain and obvious causes," 22 U. S. (9 Wheat.) at 580, one uniform requirement has been imposed on all mistrial cases. That requirement and the reason for it were explained in *United States v. Jorn*, 400 U. S. 470, 485 (1971):

> "If [the] right to go to a particular tribunal is valued, it is because, independent of the threat of bad-faith conduct by judge or prosecutor, the defendant has a significant interest in the decision whether or not to take the case from the jury when circumstances occur which might be thought to warrant a declaration of mistrial. . . . [T]he *Perez* doctrine of manifest necessity stands as a command to trial judges not to foreclose the defendant's option until a scrupulous exercise of judicial discretion leads to the conclusion that the ends of public justice would not be served by a continuation of the proceedings."

Accord, United States v. Dinitz, 44 U. S. L. W. 4309, 4311-12 (U. S. March 9, 1976); *Illinois v. Somerville*, 410 U. S. 458, 462-63 (1973).

Applying this principle to the instant case, we hold that retrial on Count I (grand larceny) of the original information was prohibited by the double jeopardy clause. Unlike Count II (obtaining money and property by false pretenses), Count I was sufficient to state an offense. Its dismissal necessarily denied appellants the chance to take the grand larceny charge "to the first jury and, perhaps, end the dispute then and there with an acquittal," *United States v. Jorn*, 400 U. S. 470, 484 (1971). Yet no reason—

other than the state's convenience in litigating the case as a unit—appears to have prompted the mistrial declaration. Certainly the "public's interest in fair trials designed to end in just judgments," *Wade v. Hunter,* 336 U. S. 684, 689 (1949), could have been adequately served by completing the trial on Count I. In these circumstances, the mistrial and retrial on Count I amounted to an archetypal double jeopardy violation.

B. *Mistrials and State Procedural Rules*

Count II (obtaining money and property by false pretenses) of the original information presents a different issue. The trial court dismissed Count II *sua sponte* after denying the state's motion to amend the information in order to correct a typographical error. Unamended, Count II failed to state an offense, but unfortunately that circumstance is not dispositive in determining the constitutionality of retrial. It has long been clear, for example, that an acquittal on a defective indictment is nonetheless a bar to subsequent prosecution for the same offense.[23] Furthermore, if the state could stultify its own trial process by claiming that a prosecution on a defective information—however concluded—did not constitute former jeopardy, the Fifth Amendment's protection against persecution by prosecution would be undermined.

23 "But although the indictment was fatally defective, yet, if the court had jurisdicion of the cause and of the party, its judgment is not void, but only voidable by writ of error. . . . If the judgment is upon an acquittal, the defendant, indeed, will not seek to have it reversed; and the government cannot." United States v. Ball, 163 U. S. 662, 669-70 (1896). As the Court recognized in Illinois v. Somerville, 410 U. S. 458, 466-68 (1973), this does not mean that a mistrial can never be justified by a defective indictment because of the possibility of a jeopardy-ending acquittal. It does mean, however, that when a defective indictment can be cured by amendment without a mistrial declaration, the first jury should not be jettisoned merely to serve the state's convenience.

The Count II mistrial does not conveniently appear under the rubrics of the classic mistrial cases—hung jury, juror disqualification, tactical exigencies of a wartime court-martial, or prolonged illness or incapacity of judge, counsel or witnesses.[24] We are aware, of course, that the Supreme Court has protested the development of *per se* rules to govern mistrials, *see, e. g., Wade v. Hunter,* 336 U. S. 684, 691 (1949) (criticizing Ninth Circuit rule that unavailability of healthy witness can never justify mistrial), as inconsistent with *Perez'* emphasis on flexibility, *see Illinois v. Somerville,* 410 U. S. 458, 467 (1973). On the other hand, an inevitably *ad hoc* balancing test would threaten to transform *Perez* from an exception into an analytical formulation "whose escape hatch is larger than the compartment from which it offers egress."[25] A more promising approach, we think, is to compare the instant case with the Supreme Court's decisions in *Downum, Jorn* and *Somerville.*

As the first Supreme Court case to hold that the double jeopardy clause prevented reprosecution after a mistrial,

24 See, e. g., Logan v. United States, 144 U. S. 263 (1892) (hung jury); Thompson v. United States, 155 U. S. 271 (1894) (juror disqualified because member of grand jury); Simmons v. United States, 142 U. S. 148 (1891) (outside influence brought to bear on jury); Wade v. Hunter, 336 U. S. 684 (1949) (court-martial); United States v. Moon, 491 F. 2d 1047, 1048 (5th Cir. 1974) (illness of defense counsel); United States ex rel. Gibson v. Ziegele, 479 F. 2d 773 (3d Cir.), cert. denied, 414 U. S. 1008 (1973) (illness of key witness occurring after trial had begun.)

25 Cf. Bickel, The Supreme Court, 1960 Term—Foreword: The Passive Virtues, 75 Harv. L. Rev. 40, 43 n. 17 (1961).

Downum v. United States, 372 U. S. 734 (1963), looms rather large on the constitutional landscape. When the government's key witness on two of six counts of passing checks stolen from the mail failed to appear the United States asked that the jury be discharged. The defendant countered by requesting that the two counts be dismissed for want of prosecution and that trial continue on the other four. There was no suggestion that the witness' non-appearance was caused by anything other than the marshal's inability to serve him with a subpoena. The prosecution knew of this difficulty, but answered ready, apparently assuming that service had been made. The trial court granted the government's motion. In holding that retrial on any of the six counts violated the double jeopardy clause, the *Downum* Court established two propositions. First, *Downum's* disposition of the two affected counts means that the fact that the government's unpreparedness is due to "excusable oversight," 372 U. S. at 742 (Clark, J., dissenting), rather than a plan to capture unfair tactical advantage, is not by itself sufficient to support a mistrial declaration. Second, *Downum's* disposition of the four other counts shows that the government may not frustrate a defendant's right to take the case to the jury by claiming possible adverse collateral estoppel effects if a multiple-count indictment is separated for trial. *Downum* is thus fully congruent with our own holding on Count I (grand larceny). *Downum* also tells us that Montana may not justify retrial on Count II (obtaining money and property by false pretenses) by claiming that the prosecutorial error was inadvertent or by asking for unitary adjudication of both counts.

United States v. Jorn, 400 U. S. 470 (1971), teaches an equally significant lesson. In *Jorn,* the trial court in a

tax fraud case declared a mistrial to safeguard prosecution witnesses' privilege against self-incrimination. The Supreme Court concluded that the trial judge had been overassiduous in his attempt to protect witnesses who fully understood their rights, and held that retrial on all counts was prohibited. *Jorn* shows that a defendant's trial position need not be impaired in order for retrial to be prohibited: the government was the only party whose proof might have been weakened by the trial court's action. In the present case, *Jorn* means that deprivation of the "valued right" to take the case to the jury is enough in itself to bar retrial unless the mistrial declaration was actually necessary to protect other important interests.

In *Illinois v. Somerville,* 410 U. S. 458 (1973), the trial court granted the state's motion for a mistrial after it was discovered that the indictment failed to allege a necessary element of the offense charged. Illinois law prevented amendment of the information. The Supreme Court held that where a state law "procedural defect might or would preclude the public from either obtaining an impartial verdict or keeping a verdict of conviction if its evidence persuaded the jury," a mistrial is constitutionally available when "the mistrial [is], under [state] law, the only way in which a defect in the indictment could be corrected." 410 U. S. at 468-69.

Somerville's explanation of its holding is not entirely satisfactory. The state rule was designed to "implement the State's policy of preserving the [state-created] right of each defendant to insist that a criminal prosecution against him be commenced by action of the grand jury," 410 U. S. at 468, and it was that policy which *Somerville* respected. It is hard to see, however, how a state's inter-

est in protecting its citizens' state procedural rights should be sufficient to deprive those same citizens of what otherwise would be a federal constitutional right not to be placed twice in jeopardy. Indeed, it would seem that the more Procrustean a state rule is, the more likely it will be—under *Somerville*—sufficient cause for subjecting defendants to two trials and two juries.

Somerville's anomalies need not detain us, however, for the facts of this case point to a result that is fully consistent with *Downum, Jorn* and *Somerville.* The applicable Montana statute, § 95-1505, Rev. Code of Mont. 1947 (Smith ed. 1969), provides:

> "(a) A charge may be amended in matters of substance at any time before the defendant pleads, without leave of court.
>
> (b) The court may permit any charge to be amended as to form at any time before verdict or finding if no additional or different offense is charged and if the substantial rights of the defendant are not prejudiced.
>
> (c) No charge shall be dismissed because of a formal defect which does not tend to prejudice a substantial right of the defendant."

One can hardly imagine a more "formal" matter than the correction of a glaring typographical error, and surely no "rights of the defendant" would have been undercut by the requested alteration. No state policy of ensuring that all criminal charges are initiated by indictment by the grand jury is involved here, for an information can be filed at the discretion of the prosecutor. Finally, although the standard by which a trial judge's action must be measured is ultimately federal, our researches indicate that Montana case law fully comports with our conclusion that the trial

court's failure to grant the motion to amend was an abuse of discretion,[26] and that the *sua sponte* declaration of mistrial on Count II was made in circumstances that, under the *Perez* doctrine, do not permit retrial.

REVERSED and REMANDED.

---

26 See, e. g., State v. Terry, 250 P. 612 (Mont. 1926) (amendment at close of state's case to change date of unlawful liquor possession from April 10, 1925 to April 24, 1925 was proper); State v. Polich, 226 P. 519, 519-20 (Mont. 1924) (clerical error in an information which made date read "19122" instead of "1922" was "matter of form" under statute governing sufficiency of charges); State v. Beeskove, 85 P. 376, 377 (Mont. 1906) (while time and place must "be so alleged as to enable a person of common understanding to know what is intended by the charge," time need not be alleged precisely unless it is element of offense); State v. Oliver, 50 P. 1018 (Mont. 1897) (amendment at close of state's evidence to change name of alleged victim of robbery is permitted.)

The current statute that controls amendment of criminal charges, § 95-1505, was enacted in 1967, see ch. 196, § 1, Laws of Montana 1967, repealing § 94-6207, Rev. Code of Mont. 1947. Former versions of the statute also made use of the distinction between form and substance, permitting amendments as to both at any time before plea, but restricting amendments after plea to "matters of form" only, in the discretion of the trial judge. See Gransberry v. State, 423 P. 2d 583 (Mont. 1967) (per curiam). The difference between form and substance has never been pellucid, but the cases indicate that in Montana a change of substance is one which elevates the charged offense from a misdemeanor to a felony, compare Gransberry v. State, 423 P. 2d 853 (Mont. 1967), and State v. Fisher, 254 P. 872 (Mont. 1927), with State v. Tritz, 522 P. 2d 603 (Mont. 1974), and State v. Knight, 387 P. 2d 22 (Mont. 1963), or which alters the type of crime charged so that a different offense, within the contemplation of the "same evidence rule," is alleged, see State v. Tropf, 530 P. 2d 1158 (Mont. 1975) (trial court correctly refused to permit amendment changing offense from possession to sale of drugs). On the other hand, where the amendment changes the charge from "first degree burglary" (which requires the state to prove the burglary occurred at night) to "burglary" (leaving the question of degree to the jury), it is a change of form only. See State v. Stewart, 507 P. 2d 1050, 1053 (Mont. 1973) (construing present statute); State v. Lu Sing, 85 P. 521, 522-23 (1906) (correction of misspelling is "matter of form" that does not render indictment insufficient).

APPENDIX B

Clancy CUNNINGHAM, Petitioner,

vs.

The DISTRICT COURT OF the THIRTEENTH JUDICIAL DISTRICT OF the STATE OF MONTANA et al., Respondents.

L. R. BRETZ, Petitioner,

vs.

Roger CRIST, as Warden of the Montana State Penitentiary, Deer Lodge, Montana, and John Moe, as Sheriff of Missoula County, Montana, Respondents.

Merrel CLINE, Relator,

vs.

The STATE OF MONTANA and Roger Crist, Warden, Montana State Penitentiary, Respondents.

Nos. CV-75-112-BLG—CV-75-114-BLG.

United States District Court,
D. Montana,
Billings, Division.

Dec. 31, 1975.

Petitions on behalf of three petitioners were filed for writs of habeas corpus. The cases were consolidated. The District Court, Battin, J., held that Montana statute which provides that jeopardy attaches in a criminal trial after the first witness is sworn does not violate double jeopardy provisions of Fifth Amendment to United States Constitution or the Montana Constitution; and that even assuming that jeopardy attaches in state proceedings when jury is sworn, doctrine of manifest necessity required that further trial be held as to defendants, despite error as to one count in information as to date which led to dismissal and refiling of information, since the flaw pertaining to the date was nothing more than a typographical defect which should not bar the continuation and completion of the trial.

Petitions denied.

1. *Constitutional Law*—260

Double jeopardy provision contained in Fifth Amendment to United States Constitution applies to the states. U. S. C. A. Const. Amend 5.

2. *Constitutional Law*—267

Due process clause of Fourteenth Amendment imposes the Sixth Amendment trial by jury upon the states. U. S. C. A. Const. Amends. 6, 14.

3. *Criminal Law*—146

Montana statute which provides that jeopardy attaches in a criminal trial after the first witness is sworn does not violate double jeopardy provisions of Fifth Amendment to United States Constitution nor the Montana Constitution. U. S. C. A. Const. Amend. 5; R. C. M. 1947, § 95-1711; Const. Mont. 1972, art. 2, § 25.

4. *Criminal Law*—170

Even assuming that jeopardy attaches in state proceedings when jury is sworn, doctrine of manifest necessity required that further trial be held as to defendants,

despite error as to one count in information as to date which led to dismissal and refiling of information, since the flaw pertaining to the date was nothing more than a typographical defect which should not bar the continuation and completion of the trial. U. S. C. A. Const. Amend. 5; R. C. M. 1947, § 95-1711; Const. Mont. 1972, art. 2, § 25.

Moses, Kampfe, Tolliver & Wright, Billings, Mont., for Clancy Cunningham.

Charles F. Moses, Moses, Kampfe, Tolliver & Wright, Billings, Mont., for L. R. Bretz.

W. William Leaphart, The Leaphart Law Firm, Helena, Mont., for relator Merrel Cline.

Richard Dzivi, Special Pros., Robert L. Woodahl, Atty. Gen. for the State of Montana, Helena, Mont., for respondents.

MEMORANDUM AND ORDER

BATTIN, District Judge.

The above-named petitioners have individually submitted petitions for writs of habeas corpus. Due to the similarity of issues, the cases were consolidated.

BACKGROUND FACTS.

Petitioner Cunningham

Petitioner was charged in Information No. 9017, filed on August 24, 1973, in Yellowstone County, with first degree assault. On March 21, 1974, a jury was impaneled

and sworn, and the omnibus instruction was read. Prior to the swearing of any witness, the State was granted a motion to dismiss due to the unavailability of the key witness. A second Information alleging third degree assault was filed on May 20, 1974. On August 16, 1974, the Yellowstone County District Court granted petitioner's motion to quash the Information because of double jeopardy. On May 2, 1975, the Supreme Court of Montana reversed the District Court's order, holding that further prosecution was not barred by double jeopardy provisions of the United States and Montana Constitutions. *State of Montana v. Cunningham, Mont.*, 535 P. 2d 186 (1975). The Supreme Court denied petitioner's petition for rehearing on May 20, 1975. The matter was set for trial on November 11, 1975.

Petitioners Bretz and Cline

Information No. 3921 was filed on October 3, 1974, in Lewis and Clark County, charging petitioners with the commission of nine felonies. On March 13, 1975, a jury was impaneled and sworn, but no witnesses were sworn. The trial court then granted a motion by petitioners to dismiss one count. The State filed and the District Court granted a motion to dismiss the remaining counts on April 4, 1975, before any witnesses were sworn; a second Information, No. 3963, alleging the commission of two felonies by petitioners, was filed on the same day. Petitioners' motion to dismiss on the grounds of double jeopardy was filed on April 25, 1975, and the District Court denied it on May 1, 1975. Petitioner Bretz filed a petition for habeas corpus with the Supreme Court of Montana, alleging double jeopardy. This was denied by that court on July 23, 1975.

Bretz v. Sheriff, Mont., 539 P. 2d 1191 (1975). On September 2, 1975, the Supreme Court denied a rehearing. A trial commenced in the District Court of the First Judicial District on June 16, 1975, and on July 2, 1975 petitioners were found guilty of obtaining money by false pretenses—the same count that had been dismissed as the result of petitioners' motion.

ISSUES.

1. Is Section 95-1711 of the Revised Codes of Montana, 1947, constitutional in light of the double jeopardy provisions of the Fifth Amendment to the United States Constitution and the Montana Constitution?

2. Assuming that the United States Supreme Court were to hold that jeopardy attaches in state proceedings when the jury is sworn, does the doctrine of "manifest necessity" require that a further trial be held as to petitioners Bretz and Cline?

DISCUSSION.

A. *Application of Fifth Amendment to the States.*

[1] There is no doubt that the double jeopardy prohibition contained in the Fifth Amendment to the United States Constitution applies to the States. *Benton v. Maryland*, 395 U. S. 784, 89 S. Ct. 2056, 23 L. Ed. 2d 707 (1969). The Court in *Benton* stated:

> "In 1937, this Court decided the landmark case of *Palko v. Connecticut*, 302 U. S. 319, 58 S. Ct. 149, 82 L. Ed. 288. Palko, although indicted for first-degree murder, had been convicted of murder in the second degree after a jury trial in a Connecticut state court.

> The State appealed and won a new trial. Palko argued that the Fourteenth Amendment incorporated, as against the States, the Fifth Amendment requirement that no person 'be subject for the same offense to be twice put in jeopardy of life or limb.' The Court disagreed. Federal double jeopardy standards were not applicable against the States. Only when a kind of jeopardy subjected a defendant to 'a hardship so acute and shocking that our polity will not endure it,' *id.* at 328, 58 S. Ct. [149], at 153, did the Fourteenth Amendment apply. The order for a new trial was affirmed. In subsequent appeals from state courts, the Court continued to apply this lesser *Palko* standard. See, *e. g., Brock v. North Carolina*, 344 U. S. 424, 73 S. Ct. 349, 97 L. Ed. 456 (1953).
>
> "Recently, however, this Court has 'increasingly looked to the specific guarantees of the [Bill of Rights] to determine whether a state criminal trial was conducted with due process of law.' *Washington v. Texas*, 388 U. S. 14, 18, 87 S. Ct. 1920, 1922, 18 L. Ed. 2d 1019 (1967). In an increasing number of cases, the Court 'has rejected the notion that the Fourteenth Amendment applies to the States only a "watered-down, subjective version of the individual guarantees of the Bill of Rights. . . ."' *Malloy v. Hogan*, 378 U. S. 1, 10-11, 84 S. Ct. 1489, 1495, 12 L. Ed. 2d 653 (1964) Only last Term we found that the right to trial by jury in criminal cases was 'fundamental to the American scheme of justice,' *Duncan v. Louisiana*, 391 U. S. 145, 149, 88 S. Ct. 1444, 1447, 20 L. Ed. 2d 491 (1968), and held that the Sixth Amendment right to a jury trial was applicable to the States through the Fourteenth Amendment. For the same reasons, we today find that the double jeopardy prohibition of the Fifth Amendment represents a fundamental ideal in our constitutional heritage, and that it should apply to the States through the Fourteenth Amendment. Insofar as it is inconsistent with this holding, *Palko v. Connecticut* is overruled." (Footnotes omitted.) *Benton, supra*, at 793-794, 89 S. Ct. at 2062.

But the Court has been careful to distinguish between *substantive rights* and *procedures*. A review of the Court's actions concerning the right to trial by jury clearly establishes that the Court has determined that as long as the substance of the right is maintained, then the procedure by which the result is reached is wholly within the discretion of the State. See 47 Am. Jur. 2d 640, 641.

[2] As held in *Duncan, supra,* the due process clause of the Fourteenth Amendment imposes the Sixth Amendment trial by jury right upon the States. Rule 23(b) of the Federal Rules of Criminal Procedure, established to protect these rights, requires that a jury shall consist of twelve persons and that a verdict shall be unanimous. Despite this federal rule, several States have differing provisions.

Oregon and Louisiana, for example, have determined that notwithstanding the federal requirement of unanimity, a conviction could be attained on a less than unanimous jury vote. The Supreme Court has held that the States have the right and power to set such procedures and that the federal rule was strictly for use in federal trials. *Apodaca v. Oregon,* 406 U. S. 404, 92 S. Ct. 1628, 32 L. Ed. 2d 184 (1972); *Johnson v. Louisiana,* 406 U. S. 356, 92 S. Ct. 1620, 32 L. Ed. 2d 152 (1972).

Similarly, the Supreme Court has determined that a State can provide for a jury trial of less than twelve persons—again notwithstanding federal rules to the contrary. *Williams v. Florida,* 399 U. S. 78, 90 S. Ct. 1893, 26 L. Ed. 2d 446 (1970).

Clearly, the Supreme Court has not mandated that States accept the federal procedure as long as the State

procedure preserves the constitutional objective. Montana's procedural rule does not present a "watered-down version" of the constitutional right. The defendants' substantive rights receive no less protection under the Montana statute than under federal procedures, for, practically speaking, the swearing of the jury and the swearing of the first witness occur nearly at the same point in time. Since the substance of the right has been clearly preserved, then the object of the constitutional provision guaranteeing that the defendant shall not be placed in jeopardy twice has been met.

As the Montana Supreme Court stated in *Cunningham, supra,* 535 P. 2d at 189:

> "We find no substantial difference between the two rules. Montana policy as enunciated by its legislature is that the trial does not start until the first witness is sworn. Sound policy reasons exist for this rule, principally that the jury as the trier of the facts has nothing to consider until the first witness is called and sworn. This appears entirely consistent with the constitutional standard that jeopardy does not attach until the defendant has been put to trial before the trier of the facts. *Serfass v. United States* (1975), supra [420 U. S. 377, 95 S. Ct. 1055, 43 L. Ed. 2d 265]."

The Court, noting that they could perceive no inherent merit in the federal rule over Montana's state law, further stated:

> " . . . It has been said that the federal rule is designed to prevent prosecutorial manipulation. *Illinois v. Somerville* [88 Ill. App. 2d 212, 232 N. E. 2d 115], supra. It has further been said that the federal rule guarantees the defendant his valued right to have his trial completed before the tribunal and jury selected for

his case. *Wade v. Hunter* (1949), 336 U. S. 684, 69 S. Ct. 834, 93 L. Ed. 974; *United States v. Jorn*, supra [400 U. S. 470, 91 S. Ct. 547, 27 L. Ed. 2d 543 (1971)].

"We fail to see in what manner the federal rule protects against these abuses to a greater extent than Montana law. Prosecutorial manipulation can be effected as readily under one rule as under the other. If bent on manipulation, a federal prosecutor can move to dismiss after the jury is selected but before it is sworn, as readily as a state prosecutor can move to dismiss after the jury is sworn but before the first witness is called. In either case, the real protection against prosecutorial manipulation is the discretion of the trial judge in granting or denying dismissal. Here, for example, the judge could have, but did not, dismiss with prejudice.

"Nor do we see any greater protection in the federal rule as far as securing to defendant the right to have his trial completed before the court and jury selected to try his case. Montana adheres to this principle also. It all depends on when the trial is considered to have commenced—whether on selection and swearing of the jury as in the federal courts, or on swearing the first witness as in Montana state courts." *Cunningham, supra,* at 188.

The United States Supreme Court has never rendered any blanket holding to the effect that a State could not decide at what point jeopardy has attached. The petitioners have cited *Breed v. Jones,* 421 U. S. 519, 95 S. Ct. 1779, 44 L. Ed. 2d 346 (1975), which they contend holds that the States cannot decide for themselves when Fifth Amendment jeopardy attaches. This is clearly not the holding of that case. The sole issue in that case was whether a juvenile court adjudication constituted a trial, thereby establishing double jeopardy on a subsequent adult trial for

the same offense. The Court, addressing itself primarily to the unique nature of juvenile proceedings and the legal rights of juveniles, concluded that such a proceeding was, in fact, like a trial and jeopardy attached. Nowhere in the opinion does the Court baldly assert that a State cannot determine at what point a trial commences. Nor does the Court ever attempt to impose any federal procedural rule upon the California Juvenile Court. The sole concern in *Breed,* as it is in the instant case, is not whether federal procedures were followed, but whether federally guaranteed rights were violated.

The Arizona Supreme Court, faced with the same conflict between federal and state rules, upheld the constitutionality of their own state rule. The Court concluded:

"The United States Supreme Court has held that the double jeopardy clause of the Fifth Amendment to the United States Constitution is applicable to the States. [citations omitted.] They did not define what constituted jeopardy and we believe the States are still allowed a certain degree of discretion as to what amounts to jeopardy. We hold, as a matter of law, that jeopardy had not attached in this case." *State v. Padilla,* 107 Ariz. 134, 483 P. 2d 549, 553 (1971); cert. den. 404 U. S. 1049, 92 S. Ct. 718, 30 L. Ed. 2d 740 (1971).

I agree with that Court's holding.

[3] Therefore, I conclude that the statute does not violate the United States Constitution nor the Montana Constitution, Article II, Section 25. *State of Montana v. Cunningham, supra,* 535 P. 2d 186.

B. *Manifest Necessity.*

[4] Assuming that jeopardy attaches in state proceedings when the jury is sworn, the doctrine of manifest

necessity would nevertheless require that a further trial be held as to petitioners Bretz and Cline.

The State alleges in its brief and oral argument that petitioners were well aware of a typographical error as to one count in the information—specifically, a date of 1973 which had inadvertently been typed "1974". The State continues that the petitioners, knowing of this error, waited until the jury was sworn and then moved for dismissal. The State, considering that it was the most important of the nine counts, dismissed the remaining eight counts and refiled the information charging two counts—alternative pleading of a single offense.

The petitioners contend that their motion to dismiss was simply to require the prosecution to conform the evidence to the pleadings and that there was no reliance by the defendants on any defect in the pleadings.

Regardless of how the parties attempt to characterize the factual situation, it appears that the flaw was nothing more than a typographical defect, which should not bar the continuation and completion of the trial.

The United States Supreme Court has been confronted with similar situations. In concluding that jeopardy had not attached, the Court in *Illinois v. Somerville,* 410 U. S. 458, 93 S. Ct. 1066, 35 L. Ed. 2d 425 (1973), stated:

> " . . . The interest of the public in seeing that a criminal prosecution proceed to verdict, either of acquittal

> or conviction, need not be forsaken by the formulation or application of rigid rules that necessarily preclude the vindication of that interest. This consideration, whether termed the 'ends of public justice,' [citation omitted] or, more precisely, 'the public's interest in fair trials designed to end in just judgments,' [citation omitted] has not been disregarded by this Court." *Somerville, supra,* at 463, 93 S. Ct. at 1070.

To prevent the refiling of an information and subsequent trial as the result of such a typographical defect certainly precludes the public's interest in a fair trial designed to end in a just judgment.

As the Ninth Circuit recently stated:

> "To adopt appellee's argument would require a mechanical formula to determine when jeopardy attaches. This approach well could undermine the policies and purposes of the constitutional safeguard. 'Whether jeopardy attaches is based on flexible policy considerations rather than hard and fast rules. . . .' *United States v. Brown,* 481 F. 2d 1035, 1040 (8 Cir. 1973); *see Illinois v. Somerville,* 410 U. S. 458, 467, 93 S. Ct. 1066, 35 L. Ed. 2d 425 (1973); *United States v. Jorn, supra,* at 480, 91 S. Ct. 547." *U. S. v. Choate,* 527 F. 2d 748, 1975.

Therefore, it is ordered that the petitions for writs of habeas corpus are denied.

APPENDIX C

In The United States Court of Appeals
For The Ninth Circuit

No. 76-1572

L. R. BRETZ,
Petitioner-Appellant,

vs.

ROGER CRIST, etc., et al.,
Respondent-Appellee.

No. 76-1169

MERREL CLINE,
Petitioner-Appellant,

vs.

THE STATE OF MONTANA, etc., et al.,
Respondent-Appellee.

NOTICE OF APPEAL

Notice is hereby given that the respondent, State of Montana, above named, hereby appeals to the United States Supreme Court from the Order entered in this proceeding on the 19th day of November, 1976.

DATED this 13th day of December, 1976.

STATE OF MONTANA
Office of the Attorney General

By: /s/ Albert W. Meloling
Chief Prosecutor

Filed December 15, 1976 in the above-entitled court.

APPENDIX D

95-1711. *Effect of former prosecution and multiple prosecutions.* (1) Definitions of terms.

(a) The term "same transaction" includes conduct consisting of:

(i) a series of acts or omissions motivated by a purpose to accomplish a criminal objective, and necessary or incidental to the accomplishment of that objective; or

(ii) a series of acts or omissions motivated by a common purpose or plan and which result in the repeated commission of the same offense or affect the same person or the same persons or the property thereof.

(b) An offense is an "included offense" when:

(i) it is established by proof of the same or less than all the facts required to establish the commission of the offense charged; or

(ii) it consists of an attempt to commit the offense charged or to commit an offense otherwise included therein; or

(iii) it differs from the offense charged only in the respect that a less serious injury or risk of injury to the same person, property or public interest or a lesser kind of culpability suffices to establish its commission.

(2) Method of prosecution when conduct constitutes more than one offense. When the same transaction may establish the commission of more than one offense, a person charged with such conduct may be prosecuted for each such offense. He may not, however, be convicted of more than one offense if:

(a) one offense is included in the other; or

(b) one offense consists only of a conspiracy or other form of preparation to commit the other; or

(c) inconsistent findings of fact are required to establish the commission of the offenses;

(d) the offenses differ only in that one is defined to prohibit a designated kind of conduct generally and the other to prohibit a specific instance of such conduct; or

(e) the offense is defined to prohibit a continuing course of conduct and the defendant's course of conduct was interrupted, and unless the law provides that the specific periods of such conduct constitute separate offenses.

(3) When prosecution barred by former prosecution. Provided the offenses, if more than one, were known to the attorney prosecuting upon sufficient evidence to justify the filing of an information or the issuance of a warrant of arrest and were consummated prior to the original charge, and provided the jurisdiction and venue of the several offenses lie in a single court, a prosecution based upon the same transaction as a former prosecution is barred by such former prosecution under the following circumstances:

(a) The former prosecution resulted in an acquittal. There is an acquittal if the prosecution resulted in a finding of not guilty by the trier of fact or in a determination that there was insufficient evidence to warrant a conviction. A finding of guilty of a lesser included offense than the offense charged which is subsequently set aside is

an acquittal of the greater inclusive offense that was charged.

(b) The former prosecution was terminated, after a complaint had been filed on a misdemeanor charge, after an information had been filed or an indictment found on a felony charge, by a final order of judgment for the defendant, which has not been set aside, reversed, or vacated and which necessarily required a determination inconsistent with a fact or a legal proposition that must be established for conviction of the offense.

(c) The former prosecution resulted in a conviction. There is a conviction if the prosecution resulted in:

(i) a judgment of conviction which has not been reversed or vacated; or

(ii) a verdict of guilty which has not been set aside and which is capable of supporting a judgment, so long as failure to enter judgment was for a reason other than a motion of the defendant; or

(iii) a plea of guilty accepted by the court, so long as failure to enter judgment was for a reason other than a motion of the defendant.

(d) The former prosecution was improperly terminated. Except as provided in this subsection, there is an improper termination of a prosecution if the termination is for reasons not amounting to an acquittal, and it takes place after the first witness is sworn but before verdict. Termination under any of the following circumstances is not improper:

(i) the defendant consents to the termination or waives his right to object to the termination; or

(ii) the trial court, in the exercise of its discretion, finds that the termination is necessary because:

(A) it is physically impossible to proceed with the trial in conformity with law; or

(B) there is a legal defect in the proceedings which would make any judgment entered upon a verdict reversible as a matter of law; or

(C) prejudicial conduct, in or outside the courtroom, makes it impossible to proceed with the trial without manifest injustice to either the defendant or the state; or

(D) the jury is unable to agree upon a verdict; or

(E) false statements of a juror on voir dire prevent a fair trial.

(4) Former prosecution in another jurisdiction—when a bar. When conduct constitutes an offense within the concurrent jurisdiction of this state and of the United States or another state or of two courts of separate and/or concurrent jurisdiction in this state, a prosecution in any such other jurisdiction is a bar to a subsequent prosecution in this state under the following circumstances:

(a) The first prosecution resulted in an acquittal or in a conviction as defined in subsection (3) and the subsequent prosecution is based on an offense arising out of the same transaction.

(b) The former prosecution was terminated, after the complaint has been filed on a misdemeanor charge, after the information was filed or the indictment found, by an acquittal or by a final order or judgment for the defendant which has not been set aside, reversed, or vacated

and which acquittal, final order or judgment necessarily required a determination inconsistent with a fact which must be established for conviction of the offense of which the defendant is subsequently prosecuted.

(5) Former prosecution before court lacking jurisdiction or when fraudulently procured by the defendant. A prosecution is not a bar within the meaning of subsections (3) and (4) under any of the following circumstances:

(a) the former prosecution was before a court which lacked jurisdiction over the defendant or the offense; or

(b) the former prosecution was procured by the defendant without the knowledge of the proper prosecuting officer or with the purpose of avoiding the sentence which might otherwise be imposed; or

(c) the former prosecution resulted in a judgment of conviction which was held invalid in any post-conviction hearing.

History: En. 95-1711 by Sec. 6, Ch. 513, L. 1973.

Multiple Offenses

Upon allegation of assault and battery, rape, kidnaping, and homicide, all arising from the same transaction, the prosecution is bound to prosecute them all at one time, in so far as possible, even though the court may be required to limit the number of verdicts the jury may return. State ex rel. McKenzie v. District Court, — M —, 525 P.2d 1211.

Supreme Court, U. S.
FILED
JUN 7 1977
MICHAEL RODAK, JR., CLERK

APPENDIX

In The

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-1200

ROGER CRIST, as Warden of the Montana State Penitentiary, Deer Lodge, Montana, et al.,

Appellants,

vs.

MERREL CLINE and L. R. BRETZ,

Appellees.

APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Filed February 18, 1977
Jurisdiction Postponed April 25, 1977

INDEX

	Page
No. 3921—Information	1
No. 3963—Information	12
No. CV 75-113-Blg—Petition for Writ of Habeas Corpus	16
No. 12846—State v. Cunningham (Mont.)	21

(The Ninth Circuit opinion is "Appendix A" on page 13 of the Jurisdictional Statement, and the District Court opinion is "Appendix B" on page 42 of the Jurisdictional Statement.)

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE STATE OF MONTANA, IN AND FOR THE COUNTY OF LEWIS AND CLARK

No. 3921

THE STATE OF MONTANA,

Plaintiff,

vs.

MERRIL CLINE, L. R. BRETZ and SHIRLEY (LANKFORD) CLINE,

Defendants.

INFORMATION

In the District Court of the First Judicial District of the State of Montana, in and for the County of Lewis and Clark, comes ROBERT L. WOODAHL, Attorney General of the State of Montana, by and through his Special Assistant Attorneys General, Richard Dzivi and James A. Bascue, and in the name and by the authority of the State of Montana, informs the Court that between the days of January 13, 1973 and February 19, 1974, at Lewis and Clark County, Montana, the above-named defendants, Merril Cline, L. R. Bretz and Shirley (Lankford) Cline, committed the offenses of GRAND LARCENY, a felony, as specified in section 94-2701 (1), R. C. M. 1947; OBTAINING MONEY AND PROPERTY BY FALSE PRETENSES, a felony, as specified in section 94-1805, R. C. M. 1947; PREPARING FALSE EVIDENCE, a felony, as specified in section 94-1703, R. C. M. 1947; OFFERING FALSE EVIDENCE, a felony, as specified in section 94-1701, R. C. M. 1947; and PRESENTING FALSE PROOFS UPON POLICY OF INSURANCE, a felony, as specified in section 94-2202, R. C. M. 1947.

All causes of action set forth hereunder are connected in their commission and are separate offenses of the same class of crimes. The Industrial Accident Board, now the Workmen's Compensation Division of the State of Montana, hereinafter will be referred to as "IAB/WCD".

It is hereby alleged:

COUNT I

That the defendants, Merril Cline and L. R. Bretz, then and there being, then and there willfully, knowingly, wrongfully, unlawfully and feloniously did, with the intent to deprive or defraud IAB/WCD of the State of Montana, on or about and between the dates of January 13, 1973 and February 19, 1974, in the County of Lewis and Clark, State of Montana, commit the crime of GRAND LARCENY, a felony, as specified in section 94-2701 (1), R. C. M. 1947, in that the defendants, Merril Cline and L. R. Bretz, did take from the possession of the IAB/WCD of the State of Montana, the true owners thereof, and obtain from such possession by color or aid of fraudulent and false representation and pretenses, and false tokens or writings, and did secrete, withhold, and appropriate to their own use and the use of persons other than the said IAB/WCD of the State of Montana, true owners thereof, money, personal property, and a certain IAB/WCD warrant or check of a value in excess of $50, to wit: $5,400, and that by so doing the defendants, Merril Cline and L. R. Bretz, acted contrary to the form, force and effect of section 94-2701 (1), R. C. M. 1947, GRAND LARCENY, a felony, and against the peace and dignity of the State of Montana.

COUNT II

For a further and separate cause of action, being a different offense of the same class of crimes and offenses and connected in its commission with the charges set forth in Count I hereof, the said Merril Cline and L. R. Bretz, then and there being, then and there did willfully, knowingly, wrongfully, designedly, unlawfully, fraudulently and feloniously, by false or fraudulent representation and pretense, on or about and between January 13, 1974 and February 19, 1974, in the County of Lewis and Cark, State of Montana, commit the crime of OBTAINING MONEY AND PROPERTY BY FALSE PRETENSES, a felony, as specified in section 94-1805, R. C. M. 1947, in that the said Merril Cline and L. R. Bretz did fraudulently obtain the possession of money, property and evidence of indebtedness from IAB/WCD in the nature of a certain IAB/WCD warrant or check, and the cash money proceeds thereof, of a value in excess of $50, to wit: $5,400, by preparing, signing and having prepared and executed, and submitting to the IAB/WCD documents alleging that decedent Wesley V. Wampole was an employee of Courtesy Mobil Home Transporting, Inc., and that the said decedent, Wesley V. Wampole, suffered an injury while in the scope of his above-mentioned employment which resulted in his death on or about January 11, 1973; that the said defendants knew the documents to be false in that the decedent, Wesley V. Wampole, was never an employee of Courtesy Mobil Home Transporting, Inc., and, further, that the decedent did not suffer an alleged injury while in the scope of his alleged employment by Courtesy Mobil Home Transporting, Inc., on January 8,

1973; that the IAB/WCD and authorized representatives thereof believed and relied upon such representations and pretenses as true, and hence settled said claim on February 19, 1974, believing that the decedent had been injured in the scope of his employment by Courtesy Mobil Home Transporting, Inc., and thus paid a settlement amount in the sum of $5,400 on February 19, 1974, and forwarded said IAB/WCD warrant or check to the defendants, and that by so doing the defendants, Merril Cline and L. R. Bretz, acted contrary to the form, force and effect of section 94-1805, OBTAINING MONEY BY FALSE PRETENSES, a felony, and against the peace and dignity of the State of Montana.

COUNT III

For a further and separate cause of action, being a different offense of the same class of crimes and offenses and connected in its commission with the charges set forth in all preceding counts hereof, the said Merril Cline and L. R. Bretz, then and there being, then and there did willfully, knowingly, wrongfully, unlawfully, frauduently and feloniously, on or about the dates of February 5, 1973 until February 13, 1973, in the County of Lewis and Clark, State of Montana, commit the crime of PREPARING FALSE EVIDENCE, a felony, as specified in section 94-1703, R. C. M. 1947, in that the said Merril Cline and L. R. Bretz prepared papers, records, instruments in writing and other matters or things, entitled "Claim for Compensation by Beneficiary in Case of Death" dated February 5, 1973 and received at IAB/WCD on February 13, 1973, with the intent to allow said papers, records, in-

struments in writing to be produced as evidence, and did so produce as evidence, for fraudulent and deceitful purposes as genuine and true, said documents at proceedings and inquiries authorized by law by said IAB/WCD into claim number 58-5489 of said Wesley V. Wampole, deceased, knowing said representations to be fraudulent and false, because said Wesley V. Wampole was not nor had he ever been employed by Courtesy Mobil Home Transporting, Inc., and did not on January 8, 1973, suffer the alleged injury in the scope of the alleged employment as alleged in the aforementioned document, and that by so doing the defendants, Merril Cline and L. R. Bretz, acted contrary to the form, force and effect of section 94-1703, R. C. M. 1947, PREPARING FALSE EVIDENCE, a felony, and against the peace and dignity of the State of Montana.

COUNT IV

For a further and separate cause of action, being a different offense of the same class of crimes and offenses and connected in its commission with the charges set forth in all preceding counts hereof, the said Merril Cline and L. R. Bretz, then and there being, then and there did willfully, knowingly, wrongfully, unlawfully and feloniously, on or about February 5, 1973 and February 13, 1973, in the County of Lewis and Clark, State of Montana, commit the offense of OFFERING FALSE EVIDENCE, a felony, as specified in section 94-1701, R. C. M. 1947, in that they, in a proceeding before the IAB/WCD on claim number 58-5489, offered in evidence a "Claim for Compensation by Beneficiary in Case of Death" as genuine

and true, purportedly and allegedly describing the injury of the decedent, Wesley Wampole, on January 8, 1973, while in the employment of Courtesy Mobile Home Transporting, Inc., knowing said document with respect to the said employment and injury to have been forged, or fraudulently altered, contrary to the form, force and effect of section 94-1701, R. C. M. 1947, OFFERING FALSE EVIDENCE, a felony, and against the peace and dignity of the State of Montana.

COUNT V

For a further and separate cause of action, being a different offense of the same class of crimes and offenses and connected in its commission with the charges set forth in all preceding counts hereof, the said Merril Cline and L. R. Bretz, then and there being, then and there did willfully, knowingly, wrongfully, unlawfully, fraudulently and feloniously, on or between the dates of March 19, 1973 until March 22, 1973, in the County of Lewis and Clark, State of Montana, commit the crime of PREPARING FALSE EVIDENCE, a felony, as specified in section 94-1703, R. C. M. 1947, in that the said Merril Cline and L. R. Bretz prepared papers, records, instruments in writing and other matters or things, entitled "Employer's First Report of Occupational Injury or Disease" dated March 19, 1973, and received at IAB/WCD on March 22, 1973, with the intent to allow said papers, records, instruments in writing to be produced as evidence, and did so produce as evidence, for fraudulent and deceitful purposes as genuine and true, said documents at proceedings and inquiries authorized by law by said IAB/WCD into claim number 58-5489 of said Wesley V. Wampole, know-

ing said representations to be fraudulent and false, because said Wesley V. Wampole was not nor had he ever been employed by Courtesy Mobil Home Transporting, Inc., and did not on January 8, 1973, suffer the alleged injury in the scope of the alleged employment as alleged in the aforementioned document, and that by so doing the defendants, Merril Cline and L. R. Bretz, acted contrary to the form, force and effect of section 94-1703, R. C. M. 1947, PREPARING FALSE EVIDENCE, a felony, and against the peace and dignity of the State of Montana.

COUNT VI

For a further and separate cause of action, being a different offense of the same class of crimes and offenses and connected in its commission with the charges set forth in all preceding counts hereof, the said Merril Cline and L. R. Bretz, then and there being, then and there did willfully, knowingly, wrongfully, unlawfully and feloniously, on or about March 19, 1973 and March 22, 1973, in the County of Lewis and Clark, State of Montana, commit the offense of OFFERING FALSE EVIDENCE, a felony, as specified in section 94-1701, R. C. M. 1947, in that they, in a proceeding before the IAB/WCD on claim number 58-5489, offered in evidence an "Employer's First Report of Occupational Injury or Disease" as genuine and true, purportedly and allegedly describing the injury of the decedent, Wesley Wampole, on January 8, 1973, while in the employment of Courtesy Mobil Home Transporting, Inc., knowing said document with respect to the said employment and injury to have been forged, or fraudulently altered, contrary to the form, force and effect of section 94-1707, R. C. M. 1947, OFFERING FALSE

EVIDENCE, a felony, and against the peace and dignity of the State of Montana.

COUNT VII

For a further and separate cause of action, being a different offense of the same class of crimes and offenses and connected in its commission with the charges set forth in all preceding counts hereof, the said Merril Cline and L. R. Bretz, then and there being, then and there did willfully, knowingly, wrongfully, unlawfully, fraudulently and feloniously, on or about the dates of January 30, 1974 until February 1, 1974, in the County of Lewis and Clark, State of Montana, commit the crime of PREPARING FALSE EVIDENCE, a felony, as specified in section 94-1703, R. C. M. 1947, in that the said Merril Cline and L. R. Bretz prepared papers, records, instruments in writing and other matters or things, entitled "Petition for Compromise Settlement" dated January 30, 1974, and received at IAB/WCD on February 1, 1974, with the intent to allow said papers, records, instruments in writing as evidence, and did so produce as evidence, for fraudulent and deceitful purposes as genuine and true, said documents at proceedings and inquiries authorized by law by said IAB/WCD into claim number 58-5489 of said Wesley V. Wampole, knowing said representations to be fraudulent and false, because said Wesley V. Wampole was not nor had he ever been employed by Courtesy Mobil Home Transporting, Inc., and did not on January 8, 1973, suffer the alleged injury in the scope of the alleged employment as alleged in the aforementioned document, and that by so doing the defendants, Merril Cline and L. R. Bretz, acted contrary to the form, force and effect of section

94-1703, R. C. M. 1947, PREPARING FALSE EVIDENCE, a felony, and against the peace and dignity of the State of Montana.

COUNT VIII

For a further and separate cause of action, being a different offense of the same class of crimes and offenses and connected in its commission with the charges set forth in all preceding counts hereof, the said Merril Cline and L. R. Bretz, then and there being, then and there did willfully, knowingly, wrongfully, unlawfully and feloniously, on or about January 30, 1974 and February 1, 1974, in the County of Lewis and Clark, State of Montana, commit the offense of OFFERING FALSE EVIDENCE, a felony, as specified in section 94-1701, R. C. M. 1947, in that they, in a proceeding before the IAB/WCD on claim number 58-5489, offered in evidence a "Petition for Compromise Settlement" as genuine and true, purportedly and allegedly describing the injury of the decedent, Wesley Wampole, on January 8, 1973, while in the employment of Courtesy Mobile Home Transporting, Inc., knowing said document with respect to the said employment and injury to have been forged, or fraudulently altered, contrary to the form, force and effect of section 94-1701, R. C. M. 1947, OFFERING FALSE EVIDENCE, a felony, and against the peace and dignity of the State of Montana.

COUNT IX

For a further and separate cause of action, being a different offense of the same class of crimes and offenses, and connected in its commission with the charges set forth

in all preceding counts hereof, the said Merril Cline, L. R. Bretz and Shirley (Lankford) Cline, then and there being, then and there did willfully, knowingly, wrongfully, unlawfully, fraudulently and feloniously, on or between the dates of January 13, 1973 and February 19, 1974, in the County of Lewis and Clark, State of Montana, commit the crime of PRESENTING FALSE PROOFS UPON POLICY OF INSURANCE, a felony, as specified in section 94-2202, R. C. M. 1947, in that the said Merril Cline, L. R. Bretz and Shirley (Lankford) Cline did present or cause to be presented a false or fraudulent claim and did submit false or fraudulent proof in support of such claim, to wit: Claim number 58-5489, for an alleged fatal injury sustained by Wesley V. Wampole on January 8, 1973, which said claim and proof falsely and fraudulently alleged that on January 8, 1973, Wesley V. Wampole suffered an injury while in the scope of his employment for Courtesy Mobil Home Transporting, Inc., which resulted in his death on January 11, 1973; submitted upon a contract of insurance between the said IAB/WCD and Courtesy Mobil Home Transporting, Inc., for the payment of a loss covered by the aforementioned insurance contract, and that by so doing the defendants, Merril Cline, L. R. Bretz and Shirley (Lankford) Cline, acted contrary to the form, force and effect of section 94-2202, R. C. M. 1947, PRESENTING FALSE PROOFS UPON

POLICY OF INSURANCE, a felony, and against the peace and dignity of the State of Montana.

DATED this 31st day of October, 1974.

ROBERT L. WOODAHL

Attorney General for
the State of Montana

By /s/ Richard Dzivi
Special Assistant Attorney General

and /s/ James A. Bascue
Special Assistant Attorney General

NAMES OF WITNESSES FOR
THE STATE OF MONTANA:

Nona Wampole	Harold Eugene Stubbs
Marjorie Stubbs	Richard Wesley Roane
William Koolhof	Hazel Evelyn Roane
Robert Coate	William Burnett
Gene Brennan	Larry Zanto
Marge Mothershead	Lyle Parker
Robert Lund	Sharlo McGehee
Don Mitchell	Guy Marble
Dr. Charles Magner	A. G. "Bud" Pillen
Margaret Condon	Pete Strizich
Morris L. Brusett	Jerry Smith
Terry Whitaker	Kingsbury N. Conner

Representative of the IAB/WCD

Representative of Environmental Development Corporation

Representative of Secretary of State for the State of Montana

Representative of Public Service Commission

Representative of Legislative Auditor, State of Montana

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE STATE OF MONTANA, IN AND FOR THE COUNTY OF LEWIS AND CLARK

No. 3963

THE STATE OF MONTANA,

Plaintiff,

vs.

MERRIL J. CLINE, L. R. BRETZ and SHIRLEY (LANKFORD) CLINE,

Defendants.

INFORMATION

In the District Court of the First Judicial District of the State of Montana, in and for the County of Lewis and Clark, comes ROBERT L. WOODAHL, Attorney General of the State of Montana, by and through his Special Assistant Attorneys General, Richard Dzivi and Al Wells, and in the name and by the authority of the State of Montana, informs the Court that between the days of January 11, 1973 and February 20, 1974, at Lewis and Clark County, Montana, the above-named defendants, Merril Cline, L. R. Bretz and Shirley (Lankford) Cline, committed the offenses of GRAND LARCENY, a felony, as specified in section 94-2701(1), R. C. M. 1947; and OBTAINING MONEY AND PROPERTY BY FALSE PRETENSES, a felony, as specified in section 94-1805, R. C. M. 1947.

That essential elements of both counts of this Information occurred during calendar year 1973, thus bringing

this Information within the savings clause provisions of Section 33 of Chapter 513, *Laws of Montana 1973.*

The counts set forth hereunder are alternative offenses arising from the same transaction.

The Industrial Accident Board, now the Workmen's Compensation Division of the Department of Labor and Industry of the State of Montana, hereinafter will be referred to as "IAB/WCD".

It is hereby alleged:

COUNT I

That the defendants, Merril Cline, L. R. Bretz and Shirley (Lankford) Cline, then and there being, then and there willfully, knowingly, wrongfully, unlawfully and feloniously did, with the intent to deprive or defraud IAB/WCD of the State of Montana, on or about and between the dates of January 11, 1973 and February 20, 1974, in the County of Lewis and Clark, State of Montana, commit the crime of GRAND LARCENY, a felony, as specified in section 94-2701(1), R. C. M. 1947, in that the defendants, Merril Cline, L. R. Bretz and Shirley (Lankford) Cline, did take from the possession of the IAB/WCD of the State of Montana, the true owners thereof, and obtain from such possession by color or aid of fraudulent and false representation and pretenses, and false tokens or writings, in that the defendants, Merril Cline, L. R. Bretz and Shirley (Lankford) Cline, did falsely represent that Wesley Wampole was employed by Courtesy Mobile Home Transporting, Inc., on January 8, 1973, and that during the course and scope of his employment on January 8, 1973, suffered an injury which resulted in his death on January 11, 1973,

and did secrete, withhold, and appropriate to their own use and the use of persons other than the said IAB/WCD of the State of Montana, true owners thereof, money, personal property, and a certain IAB/WCD warrant or check of a value in excess of $50, to wit: $5,400, and that by so doing the defendant, Merrill Cline, L. R. Bretz and Shirley (Lankford) Cline, acted contrary to the form, force and effect of section 94-2701(1), R. C. M. 1947, GRAND LARCENY, a felony, and against the peace and dignity of the State of Montana; an essential element of this offense occurred, between said dates, in calendar year 1973.

COUNT II

As an alternative offense arising from the same transaction, the said Merril Cline, L. R. Bretz and Shirley (Lankford) Cline, then and there being, then and there did willfully, knowingly, wrongfully, designedly, unlawfully, fraudulently and feloniously, by false or fraudulent representation and pretense, on or about and between January 11, 1973 and February 20, 1974, in the County of Lewis and Clark, State of Montana, commit the crime of OBTAINING MONEY AND PROPERTY BY FALSE PRETENSES, a felony, as specified in section 94-1805, R. C. M. 1947, in that the said Merril Cline, L. R. Bretz and Shirley (Lankford) Cline did fraudulently obtain money, property and evidence of indebtedness from IAB/WCD in the nature of a certain IAB/WCD warrant or check, and the cash money proceeds thereof, of a value in excess of $50, to wit: $5,400, by preparing, signing and having prepared and executed, and submitting to the IAB/WCD documents alleging that decedent Wesley V. Wampole was an employee of Courtesy Mobile Home Transporting, Inc., and that the said decedent, Wesley V. Wampole, suffered an injury while in the scope of his above-mentioned employ-

ment which resulted in his death on or about January 11, 1973; that the said defendants knew the documents to be false in that the decedent, Wesley V. Wampole, was never an employee of Courtesy Mobile Home Transporting, Inc., and, further, that the decedent did not suffer an alleged injury while in the scope of his alleged employment by Courtesy Mobile Home Transporting, Inc., on January 8, 1973; that the IAB/WCD and authorized representatives thereof believed and relied upon such representations and pretenses as true, and hence settled said claim on February 19, 1974, believing that the decedent had been injured in the scope of his employment by Courtesy Mobile Home Transporting, Inc., and thus paid a settlement amount in the sum of $5,400 on February 19, 1974, and forwarded said IAB/WCD warrant or check to the defendants, and that by so doing the defendants, Merril Cline, L. R. Bretz and Shirley (Lankford) Cline, acted contrary to the form, force and effect of section 94-1805, OBTAINING MONEY BY FALSE PRETENSES, a felony, and against the peace and dignity of the State of Montana; an essential element of this offense occurred, between said dates, in calendar year 1973.

DATED this 4th day of April, 1975.

ROBERT L. WOODAHL
Attorney General of Montana

By /s/ Richard Dzivi
Special Assistant Attorney General

and /s/ Al Wells
Special Assistant Attorney General

Office of the Attorney General
State Capitol
Helena, Montana 59601

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
BILLINGS DIVISION

No. CV 75-113-Blg

L. R. BRETZ,

Petitioner,

vs.

ROGER CRIST, as Warden of the Montana State Penitentiary, Deer Lodge, Montana, and JOHN MOE, as Sheriff of Missoula County, Montana,

Respondents.

PETITION FOR WRIT OF HABEAS CORPUS

Petitioner, L. R. BRETZ, moves the United States District Court For The District of Montana, Billings Division, to set a show cause hearing and order Respondents Roger Crist, as Warden of the Montana State Penitentiary, and John Moe, as Sheriff of Missoula County, Montana, to appear, and show cause why this Court should not issue a Writ of Habeas Corpus releasing Petitioner from their custody. In support of this motion, petitioner alleges:

1. Bretz is being illegally confined and restrained of his liberty at the Missoula County Jail, Missoula, Montana, by respondents, Roger Crist, as Warden of the Montana State Penitentiary, and John Moe, as Sheriff of Missoula County, Montana, under a Judgment of Conviction and Sentence by the District Court, Lewis and Clark County, Montana, in Criminal Cause No. 3963.

2. The Court proceedings which resulted in this illegal confinement and restraint are set forth in an Appendix which will be filed in support of this petition

within five days, the time required to obtain the same from the respective Courts involved. This Appendix is made a part of this petition here. These proceedings are:

A. Nine count information in Criminal Cause No. 3921, against Bretz and others, filed on October 3, 1974.

B. Court Minutes in No. 3921, showing that both the State and Bretz appeared for trial, and announced that they were ready for trial on March 10, 1975.

C. Court Minutes in Criminal Cause No. 3921 showing that a jury was empanelled and sworn to try No. 3920 on March 13, 1975.

D. State's Motion to Dismiss No. 3921, filed April 4, 1975.

E. Order granting State's Motion to Dismiss Information No. 3921, filed April 4, 1975.

F. A second three count Information filed as Criminal Cause No. 3963, against Bretz and others, filed April 4, 1975.

G. Bretz's Motion to Dismiss the No. 3963 because of Double Jeopardy, filed April 25, 1975.

H. Minute entry of District Court Order denying Motion to Dismiss because of Double Jeopardy, filed May 1, 1975.

I. Decision of Montana Supreme Court in State v. Cunningham (decided May 2, 1975) 32 St. Rep. 433, — M —, 535 P. 2d 186.

J. Decision of Montana Supreme Court in State v. Cunningham denying Petition for Rehearing (decided May 20, 1975).

K. Judgment of Bretz Conviction and fourteen year sentence, filed July 14, 1975.

L. Decision of Montana Supreme Court in Bretz v. Sheriff (decided July 23, 1975) 32 St. Rep. 762, — M. —, — P. 2d —.

M. Decision of Montana Supreme Court in Bretz v. Sheriff denying Petition for Rehearing (decided September 2, 1975).

3. As shown by these proceedings, Bretz was first charged by a nine count Information in No. 3921. He fully prepared for trial and a jury was empanelled and sworn to try him on his "not guilty" plea. No witnesses had been sworn or testified when the Court granted the State's Motion to Dismiss No. 3921. The State then charged Bretz with a new three count Information in No. 3963. These three counts in No. 3963 were the same as three of the nine counts charged against him in No. 3921. Bretz moved to dismiss, claiming double jeopardy. The trial court overruled Bretz's Motion to Dismiss because of double jeopardy. The Montana Supreme Court in the Cunningham decision upheld the validity of the Montana Statute, 95-1711, R. C. M. 1947 which states that jeopardy does not attach until after the first witness is sworn and testifies, as against the contention that under the Montana and United States Constitutions, jeopardy attaches when the jury is empanelled and sworn.

4. Bretz was then tried, convicted and imprisoned on one count in No. 3963, which was the same as one of the counts previously dismissed in No. 3921. Bretz's Petition for Habeas Corpus relief from the Montana Supreme

Court, on double jeopardy grounds, was denied by that Court, which reaffirmed its decision in Cunningham. This Court denied Bretz's Petition for Rehearing.

5. Jeopardy attached in Cause No. 3921 when the jury was empanelled and sworn to try that case, and Bretz's confinement and restraint under his conviction and sentence in No. 3963 violates the double jeopardy provisions of the Montana and United States Constitutions. Montana Statute 85-1711, defining when jeopardy attaches, is unconstitutional.

6. A Petition for a similar Writ of Habeas Corpus has been presented to The United States District Court For The District of Montana, Butte Division on behalf of Merril Cline, who was a codefendant with Bretz in both causes 3921 and 3963. This raises the same issue as to the constitutionality of Montana Statute 85-1711. A Petition for a similar Writ of Habeas Corpus has also been filed with this Court on behalf of Clancy Cunningham, as Cause No. _____ which raises this same legal issue. Counsel for all these parties have agreed that because this same issue is involved in all three cases, that such three cases should be joined for the purpose of briefing and arguing this constitutional issue.

WHEREFORE, Petitioner requests that this Court set a hearing on this Petition and order that the Respondents appear at such hearing, answer the allegations of this Petition, and show cause, if any they have, why this Petition for a Writ of Habeas Corpus should not be granted. Petitioner further requests that the Petitions of Merril

Cline and Clancy Cunningham be joined with this cause for the purpose of briefing and arguing the same constitutional issue presented in all three Petitions.

DATED October 24, 1975.

MOSES, KAMPFE, TOLLIVER
& WRIGHT

P. O. Box 1913
Billings, Montana 59103

By /s/ Charles F. Moses
Attorneys for Petitioner

State of Montana, County of Yellowstone: ss

CHARLES F. MOSES, of legal age, being first duly sworn, upon his oath, deposes and says that he is the attorney for the Petitioner herein, and verifies this Petition on his behalf for the reason that Petitioner is not now present in Yellowstone County, Montana, that he has read this Petition, and the facts stated therein are true.

/s/ Charles F. Moses

SUBSCRIBED and SWORN to before me this 24th day of October, 1975.

/s/ Kathleen M. Kastelitz

Notary Public for the State of Montana
Residing at Billings, Montana
My Commission Expires April 15, 1978

(SEAL)

No. 12846

IN THE SUPREME COURT OF THE
STATE OF MONTANA
1975

THE STATE OF MONTANA,
Plaintiff and Appellant,
vs.
CLANCY CUNNINGHAM,
Defendant and Respondent.

Appeal from: District Court of the Thirteenth Judicial District,

Honorable Robert H. Wilson, Judge presiding.

Counsel of Record:

For Appellant:

Hon. Robert L. Woodahl, Attorney General, Helena, Montana

Richard Dzivi argued, Special Assistant Attorney General, Great Falls, Montana

Harold F. Hanser, County Attorney, Billings, Montana

For Respondent:

Moses, Kampfe, Tolliver and Wright, Billings, Montana

Ralph Wright argued, Billings, Montana

Submitted: April 14, 1975
Decided: May 2, 1975

Filed: May 2, 1975

Thomas J. Kearney, Clerk

ATTEST: A true copy

Richard T. Conboy,
Deputy Clerk of Supreme
Court, Helena, Montana

Mr. Justice Frank I. Haswell delivered the Opinion of the Court.

The question in this case is whether further prosecution is barred by the double jeopardy provisions of the United States and Montana Constitutions. The district court held it was. We reverse.

On August 24, 1973, defendant Clancy Cunningham was charged with first degree assault arising out of the alleged stabbing of one Larry Catlin. Defendant entered a plea of "not guilty". The case was set for trial on March 21, 1974, in the district court of Yellowstone County.

On the trial date, a jury was duly selected and sworn. The district judge then read a general omnibus jury instruction without objection. Court was then recessed over the noon hour.

When court reconvened, the deputy county attorney moved to dismiss the action on the ground that a new and different charge, specifically third degree assault, was being filed against the defendant in justice court. The substantial reason for the dismissal was that the victim of the alleged assault was not available to testify. The victim, a resident of Wyoming, had not been subpoenaed. The state's motion to dismiss was granted without objection.

Defendant entered a plea of "guilty" to the third degree assault charge based on the same incident. He was sentenced in the justice court to six months in the county jail.

Thereafter on May 17, 1974, defendant, represented by different counsel, withdrew his prior plea of "guilty" and entered a plea of "not guilty" to the third degree assault

charge in the justice court. Thereupon the state dismissed the third degree assault charge and filed a first degree assault charge based on the same incident in the district court.

Defendant moved to quash the latter charge on the ground that it placed defendant in jeopardy a second time on the same charge in violation of the double jeopardy provisions of the federal and state constitutions. Affidavits were filed by the deputy county attorney, a paralegal officer of the county attorney's staff, and the victim. These affidavits are somewhat at variance concerning what prior arrangements had been made for the victim to testify and why he did not appear to testify on March 21 on the former charge of first degree assault against defendant.

After hearing, the district court granted defendant's motion to quash. The state appeals.

The Fifth Amendment's prohibition against placing a person twice in jeopardy for the same offense applies to state court criminal proceedings through the "due process" clause of the Fourteenth Amendment. Benton v. Maryland, (1969) 395 U. S. 784, 89 S. Ct. 2056, 23 L. ed. 2d 707. This proscription is not only against being twice punished, but also against being twice put in jeopardy. United States v. Ball, (1896) 163 U. S. 662, 16 S. Ct. 1192, 41 L. ed. 300; United States v. Jorn, (1971) 400 U. S. 470, 91 S. Ct. 547, 27 L. ed. 2d 543. It thus becomes necessary to determine when jeopardy attaches in a Montana state court criminal prosecution.

Montana statutes provide that jeopardy attaches in a criminal trial after the first witness is sworn. The 1969 Montana legislature so provided in Ch. 228, Session Laws

of 1969, codified as section 94-6808.3, R. C. M. 1947. This Montana statute was derived from the Model Penal Code. § 1.08, Model Penal Code, Proposed Official Draft, 1962. The American Law Institute, in formulating this portion of the Model Penal Code, determined that jeopardy customarily attaches in nonjury cases upon swearing the first witness (see Anno. 49 A. L. R. 3d 1039); and concluded that no valid rationale exists for jeopardy attaching at a different time in a jury trial. The Montana legislature in 1969 adopted this standard of when jeopardy attaches.

The 1973 Montana legislature, meeting after adoption of the 1972 Montana Constitution, again considered this state's criminal statutes on former prosecutions and double jeopardy. This legislature re-enacted section 94-6808.3, R. C. M. 1947, providing that jeopardy attaches in a criminal trial after the first witness is sworn. Section 95-1711, R. C. M. 1947.

The federal rule, unlike the Montana statute, provides that in criminal trials in the federal courts jeopardy attaches when the jury is selected and sworn. Downum v. United States, (1963) 372 U. S. 734, 83 S. Ct. 1033, 10 L. ed. 2d 100. Whether the source of this rule lies in the rule making power of the United States Supreme Court over federal court proceedings or constitutes a pronouncement of double jeopardy standards of the United States Constitution is unclear.

Thus the constitutionality of the Montana statute providing that jeopardy attaches when the first witness is sworn is squarely presented.

Defendant contends the Montana statute is unconstitutional because it violates the double jeopardy standards

of the United States Constitution as enunciated in a series of United States Supreme Court decisions, principally Downum v. United States, (1963) supra; Duncan v. Louisiana, (1968) 391 U. S. 145, 88 S. Ct. 1444, 20 L. ed. 2d 1412; Illinois v. Somerville, (1973) 410 U. S. 458, 93 S. Ct. 1066, 35 L. ed. 2d 425, 433, 434, and Serfass v. United States, (1975) — U. S. —, 43 L. ed. 2d 265, 95 S. Ct. —. Although there is language in these opinions that supports this conclusion, the facts and issues in these cases do not in our opinion set up a rigid, immutable constitutional rule to be applied mechanically in determining whether state laws conform. Although constitutional opinions of the United States Supreme Court are necessarily painted with a broad brush, the language cannot be interpreted in a factual vacuum. As the United States Supreme Court observed in *Somerville* in commenting on its holding in a prior case:

> "While it is possible to excise various portions of the plurality opinion to support the result reached below, divorcing the language from the facts of the case serves only to distort its holdings."

Each of the cases noted in the preceding paragraph on which the defendant relies is clearly distinguishable from the instant case and does not present the issue with which we are here confronted. *Downum* involved a trial in federal court where jeopardy had clearly attached under the federal rule. *Duncan* involved the right to trial by jury, not double jeopardy. *Somerville* involved a state criminal trial where jeopardy had clearly attached under a state statute providing that jeopardy attached when the former prosecution was "terminated *improperly* after the jury was impaneled and sworn", the federal rule. (For the text of the statute see People v. Somerville, 88 Ill. App.

2d 212, 232 N. E. 2d 115). *Serfass* involves a prosecution in federal court where the indictment was dismissed by pretrial order and defendant had not yet been put to trial before the trier of the facts.

Our inquiry here focuses on whether the federal rule is of constitutional dimensions precluding state legislation on the subject. Or stated another way, is the federal rule so fundamental to the American system of justice that the "due process" clause of the Fourteenth Amendment mandates its application to state court criminal proceedings?

We perceive no inherent merit in the federal rule over Montana's state law. It has been said the federal rule is designed to prevent prosecutorial manipulation. Illinois v. Somerville, supra. It has further been said that the federal rule guarantees the defendant his valued right to have his trial completed before the tribunal and jury selected for his case. Wade v. Hunter, (1949) 336 U. S. 684, 93 L. Ed. 975; United States v. Jorn, supra.

We fail to see in what manner the federal rule protects against these abuses to a greater extent than Montana law. Prosecutorial manipulation can be effected as readily under one rule as under the other. If bent on manipulation, a federal prosecutor can move to dismiss after the jury is selected but before it is sworn, as readily as a state prosecutor can move to dismiss after the jury is sworn but before the first witness is called. In either case, the real protection against prosecutorial manipulation is the discretion of the trial judge in granting or denying dismissal. Here, for example, the judge could have, but did not dismiss with prejudice.

Nor do we see any greater protection in the federal rule as far as securing to defendant the right to have his trial completed before the court and jury selected to try his case. Montana adheres to this principle also. It all depends on when the trial is considered to have commenced—whether on selection and swearing of the jury as in the federal courts, or on swearing the first witness as in Montana state courts.

We find no substantial difference between the two rules. Montana policy as enunciated by its legislature is that the trial does not start until the first witness is sworn. Sound policy reasons exist for this rule, principally that the jury as the trier of the facts has nothing to consider until the first witness is called and sworn. This appears entirely consistent with the constitutional standard that jeopardy does not attach until the defendant has been put to trial before the trier of the facts. Serfass v. United States (1975), supra. And as the United States Supreme Court observed in *Somerville:*

> "Federal courts should not be quick to conclude that simply because a state procedure does not conform to the corresponding federal statute or rule, it does not serve a legitimate state policy."

For these reasons, we conclude that the Montana statute does not violate United States constitutional standards of double jeopardy. Neither does the statute violate the double jeopardy provision of the 1972 Montana Constitution, Art. II, Section 25. This provision does not define when jeopardy attaches leaving the legislature free to make that determination. The legislature has done so by enactment of the statutes heretofore noted. In so

doing it has nullified any suggestion found in the language of State v. Gaimos, (1916) 53 Mont. 118, 162 P. 596, that jeopardy attaches upon impaneling and swearing the jury.

This cause is remanded to the district court of Yellowstone County for further proceedings.

/s/ Frank I. Haswell
Justice

We concur:

/s/ James T. Harrison
Chief Justice

/s/ Wesley Castles

/s/ John Conway Harrison

/s/ Gene B. Daley

Justices

The Ninth Circuit opinion is "Appendix A" on page 13 of the Jurisdictional Statement, and the District Court opinion is "Appendix B" on page 42 of the Jurisdictional Statement.

Supreme Court, U. S.
FILED
MAR 21 1977
MICHAEL RODAK, JR., CLERK

In the

Supreme Court of the United States

October Term, 1976

No. 76-1200

ROGER CRIST, as Warden of the Montana State Penitentiary, Deer Lodge, Montana, and John Moe, as Sheriff of Missoula County, Montana, STATE OF MONTANA,

Appellant,

v.

MERREL CLINE and L. R. BRETZ,

Appellees.

Appeal from the United States Court of Appeals For the Ninth Circuit

MOTION TO AFFIRM BY APPELLEE L. R. BRETZ

CHARLES F. MOSES
Moses, Tolliver & Wright
The Terrace, Penthouse
300 North 25th Street
P. O. Box 2533
Billings, Montana 59103

Attorneys for Appellee L. R. Bretz

In the

Supreme Court of the United States

October Term, 1976

No. _____

ROGER CRIST, as Warden of the Montana State Penitentiary, Deer Lodge, Montana, and John Moe, as Sheriff of Missoula County, Montana, STATE OF MONTANA,

Appellant,

v.

MERREL CLINE and L. R. BRETZ,

Appellees.

Appeal from the United States Court of Appeals For the Ninth Circuit

MOTION TO AFFIRM BY APPELLEE L. R. BRETZ

Appellee L. R. Bretz moves to affirm the judgment sought to be reviewed on appeal from the federal court *(Cline and Bretz v. State of Montana*, (9th Cir. 1976) 546 F.2d 1336) on the ground that it is manifest that the questions on which the decision of this cause depends are so unsubstantial as not to need further argument.

ADOPTION OF APPELLEE CLINE'S MOTION AND BRIEF

Appellee Bretz here adopts by reference the motion to dismiss or affirm and supporting authorities thereon filed by Cline. Bretz will not repeat the same here.

Rule 16, Supreme Court Rules in part states:

"Within thirty days after receipt of the jurisdictional statement . . . , the appellee may file a printed motion . . . to affirm.

"The court will receive a motion to affirm the judgment sought to be reviewed on appeal from a federal court on the ground that it is manifest that the questions on which the decision of the cause depends are so unsubstantial as not to need further argument."

The question here is whether Montana, by statute, has the right to change the Constitution of the United States as interpreted by the Supreme Court.

As noted by every United States Supreme Court decision, by all Federal Court decisions, by the decisions of every other state with the exception of Arizona, and now Montana, Fifth Amendment double jeopardy protection attaches when a jury is empanelled and sworn and not when a witness has been sworn and testified. (See citations in Appellee Cline's brief.) *Serfass v United States,* 420 U.S. 377 is the latest Supreme Court decision.

Montana has no right to change this constitutional right by legislation. In fairness to the Montana Legislature, we note that its law which defines the point when jeopardy attaches (*95-1711, R.C.M. 1947*) as after when the first witness has been sworn and testifies, was copied from a Model Penal Code

provision which was first proposed when *Palko v. Connecticut* (1937) 58 S.Ct. 149, 302 U.S. 319, 87 L.Ed. 288 was the law of the land holding that the Fifth Amendment did not control the states, and before *Palko* was specifically overruled in *Benton v. Maryland,* (1969), 89 S.Ct. 2056, 395 U.S. 784, 23 L.Ed.2d 707, holding that:

> "The double jeopardy prohibition of the Fifth Amendment represents a fundamental ideal in our constitutional heritage, and that it should apply to the states through the Fourteenth Amendment. Insofar as it is inconsistent with this holding, Palko v. Connecticut is overruled.
>
> "Palko represented an approach to basic constitutional rights which this Court's recent decisions have rejected. It was cut of the same cloth as Betts v. Brady, 316 US 455, 86 L Ed 1595, 62 S Ct 1252 (1942), the case which held that a criminal defendant's right to counsel was to be determined by deciding in each case whether the denial of that right was 'shocking to the universal sense of justice.' Id., at 462, 86 L Ed at 1602. It relied upon Twining v. New Jersey, 211 US 78, 53 L Ed 97, 29 S Ct 14 (1908), which held that the right against compulsory self-incrimination was not an element of Fourteenth Amendment due process. Betts was overruled by Gideon v Wainwright, 372 US 335, 9 L Ed 2d 799, 83 S Ct 792, 93 ALR2d 733 (1963); Twining, by Malloy v Hogan, 378 US 1, 12 L Ed 2d 653, 84 S Ct 1489 (1964), Our recent cases have thoroughly rejected the Palko notion that basic constitutional rights can be denied by the States as long as the totality of the circumstances does not disclose a denial of 'fundamental fairness'. Once it is decided that a particular Bill of Rights guarantee is 'fundamental to the American scheme of justice', Duncan v Louisiana, supra, at 149, 20 L Ed 2d at 496, the same constitutional standards apply against both the State and Federal Governments. Palko's roots had thus been cut away years ago. We today only recognize the inevitable."

Missouri Pacific Railway Company v. Castle, (Neb. 1912), 32 S.Ct. 606, 224 U.S. 541, 56 L.Ed. 875, has the answer appropriate to this case in holding that "The motion, we think, should prevail, since the questions urged upon our attention as a basis for a reversal of the judgment have been so plainly foreclosed by decisions of this court as to make further argument unnecessary." *Hodges v. Snyder*, (1923) 43 S.Ct. 435, 261 U.S. 600, 67 L.Ed. 819, confirms this by its holding that this motion to affirm "should be granted if the questions on which the decision depends are so wanting in substance as not to need further argument". See also *City of Boston v. Jackson*, (Mass. 1922), 43 S.Ct. 129, 260 U.S. 309, 67 L.Ed. 274 holding that "when the questions presented on such a motion are found by the court, in view of our previous decisions, to be so wanting in substance as not to need further argument, we dispose of the case."

After *Benton* and *Serfass* this question is hornbook law.

Respectfully submitted March 18, 1977.

CHARLES F. MOSES
MOSES, TOLLIVER & WRIGHT
The Terrace, Penthouse
300 North 25th Street
P. O. Box 2533
Billings, Montana 59103

CERTIFICATE OF SERVICE

I certify that three copies of this Motion to Affirm were served by mail on:

Mike Greely
Attorney General of Montana
Robert S. Keller,
Special Assistant Attorney General
State Capitol
Helena, Montana 59601

Attorneys for Appellant

W. William Leaphart
The Leaphart Law Firm
1 North Last Chance Gulch No. 6
Helena, Montana 59601

Attorneys for Appellee
Merrel Cline

on March 18, 1977.

CHARLES F. MOSES

IFP motion

RECEIVED
MAR 17 1977
OFFICE OF THE CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1977

No. 76-1200

ROGER CRIST, as Warden of the Montana State Penitentiary, Deer Lodge, Montana, and JOHN MOE, as Sheriff of Missoula County, Montana, STATE OF MONTANA,

Appellants,

vs.

MERREL CLINE and L. R. BRETZ,

Appellees.

Appeal from the United States Court of Appeals for the Ninth Circuit

---

MOTION TO DISMISS OR AFFIRM

Appellee, Merrel Cline, moves the Court to dismiss the appeal herein on the grounds hereinafter set forth, or to affirm the judgment (Cline v. State of Montana, 546 F.2d 1336 (9th Cir. 1976)) sought to be reviewed on the appeal on the ground that it is manifest that the questions on which the decision of this cause depends are so unsubstantial as not to need further argument.

I.

QUESTIONS 1 AND 2 HAVE BEEN ANSWERED BY THE FEDERAL COURTS, WITHOUT EXCEPTION, ADVERSELY TO THE APPELLANTS.

Appellants present three questions for review by this Court.

1947, constitutional in light of the double jeopardy provisions of the Fifth Amendment to the United States Constitution?

Appellants' contention that the United States Supreme Court's standard [requiring that jeopardy attach upon the swearing and empaneling of the jury, United States v. Jorn, 400 U.S. 470 (1971); Downum v. United States, 372 U.S. 734 (1963)] does not apply to the States is an unsubstantial question. Six Federal Circuit Courts of Appeal, as well as the United States Supreme Court, have applied this standard to State habeas corpus proceedings. To Appellee's knowledge, the Arizona Supreme Court in State v. Padilla, 483 P.2d 549 (Ariz., 1971), cert. den., 404 U.S. 1049 (1972), is the only court in the country other than the Montana Supreme Court to hold that a state is free to determine for itself when jeopardy attaches. This Arizona decision is, of course, of no precedential value in the Federal Court system.

In Breed v. Jones, 421 U.S. 519 (1975), the United States Supreme Court held that the prosecution of the respondent as an adult in California Superior Court, after an adjudicatory finding in juvenile court that he had violated a criminal statute and a subsequent finding that he was unfit for treatment as a juvenile, violated the double jeopardy clause of the Fifth Amendment as applied to the States through the Fourteenth Amendment. The United States Supreme Court specifically ruled as to what point in time jeopardy attached.

> "We therefore conclude that the respondent was put in jeopardy at the adjudicatory hearing. Jeopardy attached when the respondent was 'put to trial before the trier of facts," ibid., that is, when a juvenile court, as the trier of facts, began to hear evidence. See Serfass v. United States, 420 U.S., at 388." Breed v. Jones, supra, at 531.

Although Breed v. Jones involved a judge trial rather than a jury trial, the case is significant because the United States Supreme Court imposed the Federal standard on a California court,

citing Serfass v. United States as authority. The Serfass decision states that in the case of a non-jury trial, jeopardy attaches when the court begins to hear evidence, however, "in the case of a jury trial, jeopardy attaches when a jury is empaneled and sworn." See Serfass, supra, at 388.

It is submitted that had Breed v. Jones been a jury trial, the Supreme Court likewise would have cited Serfass and held that jeopardy attached when a jury was empaneled and sworn. In light of Breed v. Jones, the United States Supreme Court has effectively held that the states may not determine for themselves at what time jeopardy attaches and that the Federal standard enunciated in Serfass is not procedural but rather is of constitutional stature.

United States ex rel. Somerville v. State of Illinois, 447 F.2d 733 (7th Cir. 1971), involved a state prisoner's petition for habeas corpus. On remand from the United States Supreme Court, the Seventh Circuit Court of Appeals held that once the state court charge was dismissed on motion of the state, after the jury had been empaneled and sworn, the petitioner was placed in jeopardy and could not again be prosecuted for the same offense. The State of Illinois had argued, precisely as Montana does, that state law was controlling. The Circuit Court stated:

> "The State of Illinois in its brief, supposedly written as an aid to our interpretation of Jorn, contends that Illinois, not Federal, law is controlling on the issue as to when jeopardy attaches. We see no purpose in pursuing this line of reasoning. Under the mandate of the Supreme Court, the case has been remanded for consideration in the light of Jorn and Downum, and not Illinois law. In our previous opinion we held that Somerville's claim of double jeopardy must be tested by the application of Federal standards (429 F.2d, page 1336). Moreover, the issue has been settled adversely to the state by United States v. Ball, 163 U.S. 662, 16 S.Ct. 1192, 41 L.Ed.2d 300, and Benton v. Maryland, 395 U.S. 784, 89 S.Ct. 2056, 23 L.Ed.2d 707."

In Smith v. State of Mississippi, 478 F.2d 88, 93 (5th Cir. 1973), the Fifth Circuit Court of Appeals cited Downum

v. United States, 372 U.S. 734 (1963), and Illinois v. Somerville, 410 U.S. 458 (1973), stated, "In both cases the Supreme Court held that jeopardy attached when the first jury was selected and sworn."

Other cases involving state prisoner habeas corpus petitions in which Federal Circuit Courts of Appeal have applied the Federal standard as to the attaching of jeopardy are: United States ex rel. Rogers v. LaValle, 517 F.2d 1330, 1333 (2d Cir. 1975); Whitfield v. Warden of Maryland, 486 F.2d 1118, 1122 (4th Cir. 1973); Thomas v. Beasley, 491 F.2d 507, 508 (6th Cir. 1974); United States ex rel. Gibson v. Ziegele, 79 F.2d 773, 776 (3rd Cir. 1973).

Appellee knows of no Federal decisions which allow the state courts to impose a different standard as to the attaching of jeopardy. The Federal Courts which have addressed the issue are in complete agreement and thus there is no need for further argument. Appellee submits that the decision of the Ninth Circuit Court of Appeals should be affirmed.

II.

THE FEDERAL STANDARD AS TO THE ATTACHING OF JEOPARDY IS NOT A FEDERAL RULE OF CRIMINAL PROCEDURE

On page 7 of their jurisdictional statement, Appellants state:

> "Appellants submit that the judgment below presents substantial questions warranting the acceptance of this action. The Ninth Circuit Court of Appeals opinion rules that it is constitutionally impermissible for the separate states to establish rules governing when jeopardy attaches which vary in any degree past the time established in the Federal Rules of Criminal Procedure."

This characterization of the issue as involving a Federal Rule of Criminal Procedure is entirely inaccurate.

The requirement that jeopardy attach upon the swearing and empaneling of the jury is not a rule of criminal procedure but, rather, is a pronouncement by the United States Supreme Court

in its substantive interpretation of the Fifth Amendment Double Jeopardy Clause. Serfass v. United States, 420 U.S. 377 (1975).

Contrary to Appellants' contentions, the standard as to the attachment of jeopardy cannot be likened to the Supreme Court's holding that the states may have juries of less than twelve persons, Williams v. Florida, 399 U.S. 78 (1970), nor to the Supreme Court ruling that the states need not require unanimous jury verdicts. Apodaca v. Oregon, 406 U.S. 404 (1972).

The United States Supreme Court has specifically held that both the twelve man requirement and the unananimity requirement are not of constitutional stature and therefore are not obligatory upon the states. The standard as to the attaching of jeopardy, however, is of constitutional stature and has been consistently applied to the states by the Federal courts.

III.

APPELLANTS' ISSUE #3 IS NOT WITHIN THE JURISDICTION OF THIS COURT AND SHOULD BE DISMISSED

Appellants' third issue presented on appeal is as follows:

> "Assuming that this court were to hold that jeopardy attaches in state proceedings when the jury is sworn, does the doctrine of "manifest necessity" nevertheless require that a trial be held?"

The question of "manifest necessity" does not involve a state statute held by the Court of Appeals to be invalid as repugnant to the Constitution of the United States and, therefore, this question is not within the United States Supreme Court's jurisdiction over appeals pursuant to 28 U.S.C., §1254(2). Further, Appellants' jurisdictional statement contains no citations of authority which would suggest that this Court has jurisdiction, on appeal, over Issue No. 3.

Appellee respectfully submits that Issue No. 3 is not within the jurisdiction of this Court and should therefore be dismissed pursuant to Rule 16.1(a).

CONCLUSION

Appellee respectfully submits that:

1. It is manifest that Appellants' questions #1 and #2 on which the decision of this cause depends are so unsubstantial as not to need further argument, and thus the judgment of the Circuit Court should be affirmed.

2. Appellants' question #3 is not within this Court's jurisdiction over appeals pursuant to 28 U.S.C., §1254(2), and therefore said question should be dismissed.

Respectfully submitted this 14th day of March, 1977.

W. WILLIAM LEAPHART
Counsel for Appellee Merrel Cline
W. William Leaphart
1 No. Last Chance Gulch, #6
Helena, Montana 59601

CERTIFICATE OF SERVICE

This is to certify that the foregoing was duly served by mail upon opposing attorneys of record at their address or addresses this 14th day of March, 1977.

W. William Leaphart
W. WILLIAM LEAPHART
The Leaphart Law Firm
1 North Last Chance Gulch, #6
Helena, Montana 59601

Supreme Court, U. S.
FILED
JUN 7 1977
MICHAEL RODAK, JR., CLERK

In The

Supreme Court of the United States

No. 76-1200

ROGER CRIST, as Warden of the Montana State Penitentiary, Deer Lodge, Montana, et al.,

Appellant,

vs.

MERREL CLINE and L. R. BRETZ,

Respondents.

BRIEF FOR THE APPELLANTS

MICHAEL T. GREELY
Attorney General
State of Montana
State Capitol
Helena, Montana 59601

By ROBERT S. KELLER
Special Assistant Attorney General

COCKLE PRINTING CO., 1822 St. Mary's Ave., Omaha

TABLE OF CONTENTS

	Pages
Jurisdiction	1
Questions Presented	3
Statement of the Case	3
Opinions Below	6
Summary of Argument	6
Manifest Necessity	14
Conclusion	14

CASES CITED

Apodaca v. Oregon, 406 U. S. 404 (1972)	13
Benton v. Maryland, 395 U. S. 784	8
Bretz v. Sheriff, (1975) 539 P. 2d 1191	4, 5
Cunningham, et al. v. Montana, 406 F. Supp. 430 (D. Mt. 1975)	5
Downum v. United States, 372 U. S. 374 (1963	7, 8, 9, 10
Downum v. United States, 300 F. 2d 137, 139-140 (5th Cir. 1962)	9
Dutton v. Evans, 400 U. S. 74, 91 S. Ct. 210, 27 L. Ed. 2d 213 (1970)	2
Green v. United States, 355 U. S. 184, 198 (1957)	10
Illinois v. Somerville, 410 U. S. 458 (1973)	7, 8, 9, 11
In re Winship, 397 U. S. 358 (1970)	10

CASES CITED—Continued

	Pages
Johnson v. Louisiana, 406 U. S. 356 (1972)	13
Serfass v. United States, 420 U. S. 377, at 388 (1975)	7, 8, 9, 11
Simmons v. United States, 142 U. S. 148, 152 (1891)	8
U. S. v. Jorn, 400 U. S. 470	10, 11
Wade v. Hunter, 336 U. S. 684, 689 (1949)	10
Williams v. Florida, 399 U. S. 78 (1970)	13

STATUTES CITED

28 U. S. C. 1254 (2)	1, 2
Section 95-1711 of the Revised Code of Montana, 1947, as amended	3, 7
Criminal Appeals Act of 1907 (Act of March 2, 1907, c. 2564, 34 Stat. L. 1246)	12

TEXTS CITED

1 Bishop Crim. Law §§ 1012, 1014, 1015 (8th Ed. 1892)	8
4 W. Blackstone, commentaries 335-38	10

CONSTITUTION CITED

Fifth Amendment to the United States Constitution	3, 8, 13

OTHER AUTHORITIES

	Pages
Model Penal Code § 109, Comment (Tent. Draft No. 5, 1956)	10
Model Penal Code § 108.4 (Proposed Official Draft, 1962)	10
77 Harv. Law Review 1272, 1286	10

In The

Supreme Court of the United States

No. 76-1200

ROGER CRIST, as Warden of the Montana State Penitentiary, Deer Lodge, Montana, et al.,

Appellant,

vs.

MERREL CLINE and L. R. BRETZ,

Respondents.

BRIEF FOR THE APPELLANTS

JURISDICTION

The Ninth Circuit Court of Appeals' decision in effect declared a Montana statute unconstitutional, and held erroneous the Montana Supreme Court's determination that the statute is constitutional. The Supreme Court of the United States has jurisdiction to review by direct appeal the opinion complained of by the provisions of 28 U. S. C. 1254 (2).

Appellees Cline and Bretz were charged with nine counts including obtaining money by false pretenses (App. 1). A jury was empaneled and sworn, and Appellees moved to exclude any evidence with respect to the charge of obtaining money by false pretenses (and two other counts) for the reason that the Information (because of a typographical error) alleged the crime to have been committed *after* it had been repealed. The State district court dismissed the charge sua sponte. The State dismissed the remaining counts and filed a new Information (App. 2), setting forth the same count of obtaining money by false pretenses that was in the original Information. The Appellees objected on the grounds of double jeopardy, denied. The Appellees petitioned the Montana Supreme Court for a writ of habeas corpus, denied. Trial was held, resulting in a conviction, and Appellees petitioned for a writ of habeas corpus in the United States District Court for Montana (App. 3), on the grounds of double jeopardy. The writ was denied, and Appellees appealed to the Circuit Court of Appeals for the Ninth Circuit. That Court reversed, in effect holding that the Montana statute (Jur. St. App. D) (which permits reprosecution unless the first witness has been sworn) is unconstitutional, and that the Montana Supreme Court's determination that the statute is constitutional (App. 4) was erroneous.

The State's remedy by appeal is under the provisions of 28 U. S. C. § 1254 (2). *Dutton v. Evans,* 400 U. S. 74, 91 S. Ct. 210, 27 L. Ed. 2d 213 (1970).

QUESTIONS PRESENTED

1. Can Montana determine by statute that jeopardy attaches in a trial when the first witness is sworn, or must it conform to the Federal Procedural Rules which establish the swearing of the jury as the point at which jeopardy attaches?

2. Or, is Section 95-1711 of the Revised Codes of Montana, 1947, as amended, constitutional in light of the double jeopardy provisions of the Fifth Amendment to the United States Constitution?

3. Assuming that this Court were to hold that jeopardy attaches in state proceedings when the jury is sworn, does the doctrine of "manifest necessity" nevertheless require that a trial be held?

STATEMENT OF THE CASE

The petition for writ of habeas corpus by Appellee Bretz in the United States District Court was made a part of the stipulated Appendix (App. 3) for the sole purpose of setting out the background facts, and the State agrees that the facts set forth therein are substantially correct.

The Information No. 3921 (App. 1) in this matter was filed on October 3, 1974, in Lewis and Clark County, State of Montana, charging Cline and Bretz with the commission of nine felonies. On March 19, 1975, a jury was empaneled and sworn; no witnesses were sworn. Before opening statements and before any evidence had been offered, the jury was excused as defense counsel presented several mo-

tions to the court. The most important of these motions sought to restrict the State's evidence to the allegations of the Information. This was aimed at Count II (obtaining money and property by false pretenses), although two other counts were similarly involved; the Information mistakenly charged that the conduct constituting this offense had occurred between January 13, 1974 (instead of 1973) and February 19, 1974. The Montana Criminal Code, 1973, a sweeping, comprehensive revision of the substantive law of the State, took effect January 1, 1974, repealing all previous criminal laws, including the charging statute.

The State resisted the attempt to excise Count II from its case, and on March 21, 1975 moved to amend Count II to correct the typographical error. On March 24, 1975, the trial court denied this motion and sua sponte dismissed Count II for failing to state an offense. After the Montana Supreme Court declined to grant the State's petition for a writ of supervisory control, the State returned to the trial court and moved to dismiss the remaining counts in order to file a new Information. The trial court granted the motion, and discharged the jury on April 4, 1975; a second Information, No. 3963 (App. 2), alleging the commission of two felonies by Appellees was filed on the same day. Count I, grand larceny, was the same as the first Information, a count dismissed by the State. Count II, obtaining money by false pretenses, was the same as the first Information, but with the corrected date. Appellees' motions to dismiss on the grounds of double jeopardy were filed on April 25, 1975 and denied on May 1, 1975. Appellee Bretz filed a petition for habeas corpus with the Supreme Court of Montana alleging double jeopardy. This was denied by that court on July 23, 1975, *Bretz v. Sheriff*,

(1975) 539 P. 2d 1191. On September 2, 1975 the Supreme Court denied a rehearing. A trial commenced in the State District Court of the First Judicial District on June 16, 1975, and on July 2, 1975 Bretz and Cline were found guilty of obtaining money by false pretenses—one of the same counts that had been dismissed in the earlier proceeding by the trial court because of a typographical error.

Bretz and Cline filed separate petitions for writs of habeas corpus in the United States District Court for the District of Montana, Billings Division (App. 3), and the matters were ordered consolidated with that of a similar petition filed by Clancy Cunningham. On December 31, 1975 the Honorable James F. Battin denied the petition. *Cunningham, et al. v. Montana,* 406 F. Supp. 430 (D. Mt. 1975) (Jur. St. p. 42).

(*State v. Cunningham* (App. 4) involving the same question, was decided by the Montana Supreme Court, and is inserted in the Appendix here by reason of the fact that the Montana Supreme Court refers to that opinion as controlling in denying the writ of habeas corpus of appellee Bretz, *Bretz v. Sheriff, supra.* Cunningham also petitioned the United States District Court, and the petitions of Appellees here and Cunningham were consolidated. Thereafter, Cunningham died, and his appeal to the Ninth Circuit Court of Appeals was dismissed. Thus, the reason that his name figured so prominently in the proceedings below, but not now.)

Notices of appeal to the Ninth Circuit Court of Appeals were filed by Bretz and Cline, and the matters were again consolidated. In their opinion filed November 19, 1976 (Jur. St. p. 13), the Ninth Circuit Court of Appeals

reversed the lower court, ruling that the State's statute did not control when jeopardy attached in the first proceeding and that under federal rule the defendants had been placed in jeopardy in violation of the Fifth Amendment. The court went on to reverse the other part of the lower court's decision which held that even if jeopardy had attached, the doctrine of "manifest necessity" required that the trial be held. The Appellants herein duly filed their notice of appeal.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit was decided and filed on November 19, 1976, and is in the Jurisdictional Statement at page 13. The opinion of the United States District Court, District of Montana, reversed by the Ninth Circuit Court of Appeals is in the Jurisdictional Statement, at page 42.

SUMMARY OF ARGUMENT

"(The United States Supreme) Court has consistently adhered to the view that jeopardy does not attach, and the constitutional prohibition can have no application, until a defendant is 'put to trial before the trier of the facts, whether the trier be a jury or a judge', *U. S. v. Jorn*, 400 U. S. 470, at 479. See *Kepner v. United States*, 195 U. S. 100, 128, 130-131 (1904); *United States v. Macdonald*,

207 U. S. 120, 127 (1907); *Bassing v. Cady*, 208 U. S. 386, 391-392 (1908); *Collins v. Loisel*, 262 U. S. 426, 429 (1923)", *Serfass v. United States*, 420 U. S. 377, at 388 (1975). Montana statutes provide that the defendant is not put to trial before the trier of the facts until the first witness is sworn, Section 95-1711, R. C. M. 1947, as amended. Jur. St. p. 55). (That lengthy statute can be condensed to read as follows:

> "(3) When Prosecution Barred by Former Prosecution.
>
> " . . . A prosecution based upon the same transaction as a former prosecution is barred by such former prosecution under the following circumstances:
>
> (a)-(c) . . .
>
> (d) the former prosecution was improperly terminated. Except as provided in this subsection, there is an improper termination of a prosecution if the termination is for reasons not amounting to an acquittal, and it takes place after the first witness is sworn but before verdict. . . ."

The Ninth Circuit Court of Appeals takes the position that jeopardy attaches, in a jury trial, when a jury is empaneled and sworn, citing *Downum v. United States*, 372 U. S. 374 (1963), *Illinois v. Somerville*, 410 U. S. 458 (1973), and *Serfass v. United States, supra*. It is the position of the Appellant that there is "a point in criminal proceedings at which the constitutional purposes and policies are implicated". *United States v. Jorn, supra*, at 480; *Serfass v. United States*, at 388, and that that point is when the court begins to hear evidence, i. e., at the point when the first witness is sworn, as is recognized in a non-jury trial, *Serfass v. United States*, at 388. And, that the

pronouncements of this Court in the past that in a jury trial, jeopardy attaches when a jury is empaneled and sworn, have arisen under circumsances when this precise point was not in dispute.

Putting it another way, the rule has previously been announced, but the reason for the rule has never been.

The background of the federal rule is obscure, at best. 1 Bishop Crim. Law §§ 1012, 1014, 1015 (8th Ed. 1892) states that the greater weight of authority has jeopardy attaching when the jury is sworn, and cites a number of *State* cases for the authority. And See: *Simmons v. United States,* 142 U. S. 148, 152 (1891) for a similar determination. There is no starting point, it just emerged, without opposition. The states were not bound by the rule, and the Doctrine of Manifest Necessity was sufficiently liberal as to not make much difference. The point is, for at least this century, there has been no other rule in federal courts. This has not always been the rule in the States, but not until 1969, in *Benton v. Maryland,* 395 U. S. 784, is the Fifth Amendment applicable to the states, i. e., not until then does the occasion arise to examine the federal rule in the light of the state rule, as to when jeopardy attaches. Again, putting it another way, *Serfass v. United States, supra,* simply states that jeopardy attaches when a jury is empaneled and sworn, and cites *Downum v. United States, supra,* and *Illinois v. Somerville, supra. The reason for the rule was not given,* nor did it need to be, for Serfass was concerned with a fact situation arising before a jury trial had been set.

Illinois v. Somerville, supra, at page 467, gives the rule, and cites *Downum, supra,* as authority, *without going into the reason.* The fact of the matter is, the rule was assumed, and *Somerville* was a "manifest necessity" case. No one argued the rule, for the Illinois Rule and the Federal Rules were the same. (Justice Tuttle, speaking for the Ninth Circuit Court of Appeals [Jur. St. p. 27], stated that this argument "erroneously equates a circumstance with a dispositive factor in a Supreme Court opinion. The *Somerville* court never mentions the state rule, and a thorough sifting of the opinion fails to discover even a shard of evidence suggesting that the court did not consider federal standards controlling". It may have been just a circumstance, but there was no reason for Illinois to raise the point. Illinois had no alternative. "Manifest necessity" was the only point in issue, whether a circumstance or dispositive.) And *Somerville* cited *Downum.*

Downum was clearly a "manifest necessity" case . . . *the federal rule as to when jeopardy attaches was assumed, and never debated.* The fact situation in *Downum* arose at a point when the jury had been empaneled and sworn, but before any witness had been sworn. Justice Tuttle put Montana's dilemma very succinctly when he stated, "since the mistrial in *Downum* had been declared after the first jury was empaneled but before any evidence had been introduced, 372 U. S. at 741 (Clark, J., dissenting); *Downum v. United States,* 300 F. 2d 137, 139-40 (5th Cir. 1962), the case necessarily stands for the proposition that jeopardy attaches when a jury is empaneled. The court explicitly adopted this reading of Downum in *Illinois v. Somerville,* 410 U. S. 458, 467-68 (1973), and *Serfass v. United States,* 420 U. S. 377, 388 (1975)."

We know that this was not the rule at the common law, nor at the time that the Constitution was adopted.

4 W. Blackstone, commentaries 335-38; *Green v. United States,* 355 U. S. 184, 198 (1957) (Frankfurter, J. dissenting). It is not fair to say that it emerged as a part of the American common law, in much the same manner as "beyond a reasonable doubt". *In re Winship,* 397 U. S. 358 (1970), for the model penal code commission, a learned group, formulated the rule that Montana adopted, with a tentative draft in 1956, Model Penal Code § 109, Comment (Tent. Draft No. 5, 1956), and an official Draft in 1962, Model Penal Code § 108.4 (Proposed Official Draft, 1962), both before *Downum.* And See: 77 *Harv. Law Review* 1272, 1286, for a number of states that do not follow the federal rule.

So is there a reason for the rule? And a reason that approaches constitutional mass? The difference in time between the federal rule and the Montana rule is negligible, and the only intervening factor of any significance is that cited by *Wade v. Hunter,* 336 U. S. 684, 689 (1949), "What has been said is enough to show that a defendant's valued right to have his trial completed by a particular tribunal must in some instances be subordinated to the public's interest in fair trials designed to end in just judgments". (That was a General Courts Martial where the tribunal had heard all but two witnesses.) This has been construed to mean that a defendant has a valued right to a particular jury that has just been selected, a right of constitutional dimensions. We submit that the right is more akin to the speedy trial right for the defendant to have his trial completed, to get it over with, rather than to have a mistrial declared, and a retrial later. "It is, after all, that possibility—the chance to 'end the dispute then and there with an acquittal,' *United States v. Jorn,*

supra, at 484—that makes the right to a trial before a particular tribunal of importance to a defendant". *Illinois v. Somerville, supra,* at p. 475 (White, J., dissenting) and continuing, at 476, " 'the trial judge must recognize that lack of preparedness by the government . . . directly implicates policies underpinning both the double jeopardy provisions and the speedy trial guarantee.' (Jorn), at 486".

But that right has nothing to do with not being twice tried, for nothing has been submitted to that jury until the first witness is sworn. "Without risk of a determination of guilt, jeopardy does not attach, and neither an appeal nor further prosecution constitutes double jeopardy." *Serfass, supra,* at 391.

". . . the 'constitutional policies underpinning the Fifth Amendment guarantee' are not implicated before that point in the proceedings at which 'jeopardy attaches'. *United States v. Jorn,* 400 U. S. at 480. As we have noted above, the court has consistently adhered to the view that jeopardy does not attach until a defendant is 'put to trial before the trier of the facts, whether the trier be a jury or a judge'. Id. at 479. This is by no means a mere technicality, nor is it a 'rigid' mechanical rule. It is, of course, like most legal rules, an attempt to impart content to an abtraction." *Serfass v. United States,* at 390. Justice Tuttle commenced his opinion by stating, "the tension between federalism and the doctrine of selective incorporation of Bill of Rights guarantees via the Fourteenth Amendment inevitably generates appeals such as this." (Jur. St. p. 13). It may well be that his observation is the reason why this case was accepted, but we don't see that dichotomy. We

think this court has imparted content to an abstraction, by determining that jeopardy attaches when the defendant is put to trial before the trier of the facts, whether the trier be a jury or a judge. We think that the Montana rule is within that point. We think that if the States want to adopt more rigid rules, rules that cause jeopardy to attach even earlier, it is not only within their prerogative, but it breaches no constitutional right.

Illustrative of the point is the Criminal Appeals Act of 1907 (Act of March 2, 1907, c. 2564, 34 Stat. L. 1246) where the government was permitted to take a writ of error ". . . From the decision or judgment sustaining a speical plea in bar, when the defendant has not been put in jeopardy . . .". Congress could just as easily have added, "after the first witness is sworn" (in which case we would not be here today), or, "after the jury is empaneled and sworn". Neither would infringe upon the constitutional right of the defendant against double jeopardy, one would just be more rigid, as in the case of some states. Putting it another way, have the federal rules of evidence, enacted by Congress, obtained constitutional stature, for they certainly affect substantive rights? If Congress were now to permit appeals by the government until after the first witness is sworn, in jury cases, would this be unconstitutional?

All of the other arguments advanced relative to the burdens upon the defendant, e. g., the anxiety of getting ready for trial, the financial strain of preparing for the first trial, etc., in the final analysis, are just as true in a non-jury case, and just as true just before the impaneled jury was sworn as they are just after the first witness is sworn. They may well fall within the realm of the desires

of the defendant, but the controlling question is when do they reach constitutional mass under the double jeopardy provisions of the Fifth Amendment?

"The threshold question is thus whether the federal attachment of jeopardy rule is a product of constitutional exegesis or simply a nonconstitutional consequence of the Supreme Court's supervisory power over federal courts and federal officials", Justice Tuttle, in the opinion below (Jur. St. p. 20). The opinion distinguishes *Williams v. Florida*, 399 U. S. 78 (1970), and *Apodaca v. Oregon*, 406 U. S. 404 (1972) (and, presumably, *Johnson v. Louisiana*, 406 U. S. 356 (1972)), "as non-constitutional rules in federal as well as state courts. That is, neither requirement was termed a sine qua non of the jury trial right protected by the Sixth Amendment in federal court, and thus neither —under established incorporation doctrine—was found to be indispensable in state proceedings." (Jur. St. p. 23). Is the distinction in the instant case "indispensable"? The Model Penal Code finds no distinction, and places the point of attachment of jeopardy at the same place, in both jury and non-jury cases. The "valued right" concept, as applied to the particular tribunal, ought to be even more important in the non-jury case, for at least then counsel has some knowledge of the predilections of the trier of the facts.

We submit that the distinctions in the past have arisen when the choice as to when jeopardy should attach centered on when the jury was sworn versus when the jury had reached its verdict. The Model Penal Code used "after the first witness was sworn", to make the rule the same in both jury and non-jury cases. No case has argued that distinction.

MANIFEST NECESSITY

"Manifest Necessity" does not appear to be a proper subject for this appeal, jurisdictionally. Since the State found that jeopardy had not attached, the question of manifest necessity has not been ruled upon by any state court in this action. It appears for the first time in the federal district court.

CONCLUSION

In conclusion, Appellant asks that the Ninth Circuit Court of Appeals' decision be reversed, and that the Montana statute, holding that jeopardy attaches in a jury trial at the time when the first witness is sworn be held constitutional.

Respectfully submitted this 6th day of June, 1977.

Respectfully submitted,

MICHAEL T. GREELY
Attorney General of Montana

By ROBERT S. KELLER
Special Assistant Attorney General

CORRECTED COPY

Supreme Court, U. S.
FILED
AUG 5 1977
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 76-1200

ROGER CRIST, as Warden of the Montana State Penitentiary, Deer Lodge, Montana, et al.,

Appellants,

v.

MERREL CLINE and L. R. BRETZ,

Appellees.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR APPELLEE L. R. BRETZ

CHARLES F. MOSES
The Terrace, Penthouse
300 North 25th Street
P. O. Box 2533
Billings, Montana 59103

Counsel for appellee Bretz

Washington, D.C. • CLB PUBLISHERS' • LAW PRINTING CO. • (202) 393-0625

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES i

OPINIONS BELOW 1

JURISDICTION 2

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED 3

QUESTIONS AS PRESENTED BY APPELLANT 4

ADOPTION OF CLINE BRIEF BY REFERENCE 4

STATEMENT 4

ARGUMENT 6

A. IS THE MONTANA STATUTE THAT JEOPARDY DOES NOT ATTACH UNTIL AFTER THE FIRST WITNESS IS SWORN UNCONSTITUTIONAL? 6

B. THE SOLICITOR GENERAL'S MEMORANDUM AS *AMICUS CURIAE* IS NOT PROPER AND SHOULD NOT BE CONSIDERED 17

C. MANIFEST NECESSITY DOES NOT ALLOW A SECOND TRIAL AFTER JEOPARDY HAD PROPERLY ATTACHED 19

CONCLUSION 32

TABLE OF AUTHORITIES

Cases:

Adney v. U.S., ____ U.S. ____, 52 L. Ed. 2d 651, 97 S. Ct. ____ (decided June 9, 1977) 9

Alexander v. Hall, D.C.S.C., 64 F.R.D. 152 19

Anderson v. Smith, 148 So. 2d 243 (Ala.) 19

Baker v. State, 289 A.2d 348 (Md. 1972) 12

Benton v. Maryland, 395 U.S. 784, 23 L. Ed. 2d 707, 89 S. Ct. (1969) 7,13,15

Page

Bernard v. State, 481 S.W.2d 427 (Tex. 1972).....12

Booker v. Phillips, 418 F.2d 434 (Kan. 1969).....12

Bretz v. Crist, *et al*, 546 F.2d 1336 (9th Cir. 1976) (Decided November 18, 1976).....2

Bretz v. Sheriff, 539 P.2d 1191 (decided July 23, 1975).....1

Brown v. Ohio, 45 L.W. 4697 (decided June 16, 1977).....16

City of Tempe v. Prudential Ins. Co. of America, 510 P.2d 745, 109 Ariz. 429, App. dism. 414 U.S. 1088, 38 L. Ed. 2d 546, 94 S. Ct. 717.....19

Cline and Bretz v. Montana, 406 F. Supp. 430 (decided December 31, 1975).....1

Court v. Sanduski, C.A. Ill., 206 F.2d 915.....19

Curry v. Superior Court of the City and County of San Francisco, 87 Cal. Rep. 361, 470 P.2d 345 (1970).....15

Ex parte Bornee, 76 W. Va. 360, 85 S.E. 529.....12

Ex parte Lange, 18 Wall. 163, 169, 21 L. Ed. 872 (1874).....9

Fornaris v. Ridge Tool Co., 400 U.S. 41, 27 L. Ed. 2d 174, 91 S. Ct. 156 (Puerto Rico, 1970).....18

Himmelfarb v. U.S., 175 F.2d 924.....12,28

Howard v. U.S., 372 F.2d 294.....12

I.T.S. Rubber Co. v. Essex Rubber Co., 272 U.S. 429, 71 L. Ed. 355, 45 S. Ct. 136 (Mass. 1926).....18

Illinois v. Somerville, 410 U.S. 458, 93 S. Ct. 1066, 35 L. Ed. 2d 425.....9,14,19

Kemp v. Rubin, 64 N.Y.S.2d 510, 187 Misc. 707.....19

Klinefelter v. Superior Court, 502 P.2d 531 (Cal.).....12

Lee v. U.S., 45 L.W. 4661 (decided June 13, 1977).....16,29,31

McNeal v. Hollowell, 481 F.2d 1145 (1973).....14

New Haven Inclusion Cases, 399 U.S., note 78, at page 481, 392, 26 L. Ed. 2d 691, 90 S. Ct. 2065.....18

Palko v. Connecticut, 302 U.S. 319, 87 L. Ed. 288, 58 S. Ct. 149 (1937).....6,7

People v. Scott, 337 N.Y.S.2d 640 (1972).....12

Serfass v. U.S., 420 U.S. 337 (1975).....9,16

Page

Slagle v. Ohio, 366 U.S. 259, 81 S. Ct. 1076 (1961).....2

Smith v. State of Mississippi, 478 F.2d 88.....14

State v. Cline, *et al*, 555 P.2d 724 (decided October 10, 1976).....1,8

State v. Gaimos, 162 Pac. 156, 53 Mont. 118.....12

State v. Sheriff, *et al*, 539 P.2d 1191 (1975).....8

State ex rel Bennett v. Bonner, 214 P.2d 747, 123 Mont. 414.....19

State ex rel Kvallen v. Graybill, 496 P.2d 1127 ___ Mont. ___.....19

U.S. v. Crescent Amusement Co., 323 U.S. 173, 89 L. Ed. 160, 655 S. Ct. 254 (Tenn. 1944).....18

U.S. v. LeMay, 330 F. Supp. 628.....11,24

U.S. v. Martin Linen Supply Co., ___ U.S. ___, 51 L. Ed. 2d 642 (decided April 4, 1977).....8

U.S. v. Minyard, quoting 22 CJS 637, Criminal Law Section 241.....11

Wade v. Hunter, 336 U.S. 684, 93 L. Ed. 974, 69 S. Ct. 834.....11,15,20,24

Constitutions and Statutes:

United States Constitution, Amendment 5.....*passim*

Montana Constitution, 1889, Art. III, Sec. 18.....3

Montana Constitution, 1972, Art. II, Sec. 25.....3,11

28 U.S.C.A. 1254(2).....2,3,18

Revised Codes of Montana, 1947, 95-1711.....4,11

Other Authorities:

15 Am. Jur. Criminal Law 40.....12

22 C.J.S. 241.....11

Wharton's Criminal Evidence 396.....12

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 76-1200

ROGER CRIST, as Warden of the Montana State Penitentiary, Deer Lodge, Montana, et al.,

Appellants,

v.

MERREL CLINE and L. R. BRETZ,

Appellees.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR APPELLEE L. R. BRETZ

OPINIONS BELOW

A. *Bretz v. Sheriff*, 539 P.2d 1191 (decided July 23, 1975) is the Montana Supreme Court decision denying appellees' original application for a writ of habeas corpus on double jeopardy grounds.

B. *Cline and Bretz v. Montana*, 406 F. Supp. 430 (decided December 31, 1975) is the Montana Federal District Court decision denying appellees' application for a writ of habeas corpus.

C. *State v. Cline, et al*, 555 P.2d 724 (decided October 10, 1976) is the Montana Supreme Court decision which on appeal

affirmed appellee Bretz's conviction. One of the errors claimed was denial of his objection that double jeopardy barred this trial. Appellee Cline's conviction was here reversed and dismissed which may affect his status here.

D. *Bretz v. Crist, et al,* 546 F.2d 1336 (9th Cir. 1976) (decided November 18, 1976) is the Court of Appeals decision reversing the Montana Federal District Court decision (B above) and which is now here on appeal to the United States Supreme Court.

JURISDICTION

The decision of the Court of Appeals for the Ninth Circuit was entered on November 18, 1976. Notice of appeal was filed on December 13, 1976 in the Circuit Court. This case was docketed and appellant's Jurisdictional Statement was filed on February 18, 1977.

Appellee Cline filed a motion to dismiss or affirm on March 21, 1977.

Appellee Bretz filed a motion to affirm on March 21, 1977.

This court granted review on April 25, 1977, ordering that:

> "Further consideration of the question of jurisdiction is postponed to the hearing of the case on the merits."

Appellant claims that jurisdiction rests upon United States Supreme Court Rules 13(2) and 15, (Jur. St. p. 1) and 28 U.S.C. 1254(2) (App. Br. p. 1).

Rule 40(1)(b) requires that appellant's brief on the merits contain a "concise statement of the grounds on which the jurisdiction of this court is invoked, with citation to the statutory provision and to the time factors upon which such jurisdiction rests". This also corresponds to the requirements of Rule 15(1)(b) as to the jurisdictional statement. Appellant's brief does not refer to this court's order granting review nor to its order postponing the jurisdictional question, as required. *Slagle v. Ohio,* 366 U.S. 259, 81 S. Ct. 1076 (1961), holds that where jurisdiction has been postponed to the merits, the brief should show "fully" the basis for

Supreme Court jurisdiction, or the appeal may be dismissed and appellant's brief does not do this.

As raised in appellee Cline's motion to dismiss or affirm, adopted by reference in appellee Bretz's motion to affirm, the third question raised as to manifest necessity does not involve a state statute held repugnant to the United States Constitution by the Court of Appeals. Accordingly, there is not jurisdiction under 28 U.S.C. 1254(2) which provides:

> "Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:
>
> * * *
>
> "(2) By appeal by a party relying on a State statute held by a court of appeals to be invalid as repugnant to the Constitution, treaties or laws of the United States, but such appeal shall preclude review by writ of certiorari at the instance of such appellant, and the review on appeal shall be restricted to the Federal questions presented; . . . ."

Neither the jurisdictional statement nor Appellant's Brief contain the required citations as to authorities on this question of jurisdiction.

However, appellant's brief at page 14 abandons this third question on appeal involving manifest necessity so this should resolve this dispute.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Amendment 5, Constitution of the United States, in part:

"... nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb;"

Art. III, Sec. 18, 1889 Montana Constitution, in part:

"... nor shall any person be twice put in jeopardy for the same offense."

Art. II, Sec. 25, 1972 Montana Constitution, in part:

"No person shall again be put in jeopardy for the same offense tried in any jurisdiction."

Sec. 95-1711(3), Revised Codes of Montana, 1947, in part:

". . . a prosecution based upon the same transaction as a former prosecution is barred by such former prosecution under the following circumstances:

* * *

"(d) The former prosecution was improperly terminated. Except as provided in this subsection, there is an improper termination of a prosecution if the termination is for reasons not amounting to an acquittal, and it takes place after the first witness is sworn but before verdict."

QUESTIONS AS PRESENTED BY APPELLANT

"1. Can Montana determine by statute that jeopardy attaches in a trial when the first witness is sworn, or must it conform to the Federal Procedural Rules which establish the swearing of the jury as the point at which jeopardy attaches?

2. Or, is Section 95-1711 of the Revised Codes of Montana, 1947, constitutional in light of the double jeopardy provisions of the Fifth Amendment to the United States Constitution?

3. Assuming that this Court were to hold that jeopardy attaches in state proceedings when the jury is sworn, does the doctrine of 'manifest necessity' nevertheless require that a trial be held?" (App. Br. p. 3).

ADOPTION OF CLINE BRIEF BY REFERENCE

Bretz here adopts by reference the brief for appellee Merrel Cline filed herein. Bretz will try to not unnecessarily repeat law and argument cited there.

STATEMENT

Bretz adopts the Statement set forth in appellee Cline's brief, and it should not be necessary to repeat the same here. However, it

should be noted that appellee Cline's brief was filed prior to the time the *amicus curiae* memorandum of the Solicitor General was filed. As noted below, there are numerous errors contained in the Solicitor General's statement. Bretz is well aware of these errors and the correct facts. However, the Supreme Court rules require that a statement of facts should be reflected by and decided through that part of the record that supports the same. As the Solicitor General's memorandum also states, the record here does not include the proceedings held in the state district court. Therefore, it is not here possible for Bretz to correctly set forth all of the facts as to the record below, with reference thereto, as the same are not now before this Court.

As also noted below, these facts are not in any event proper before this Court, as the only question properly that should be considered here is the question as to the constitutionality of the Montana statute, and the facts and record which would support the Solicitor General's position as to manifest necessity.

However, Bretz must dispute certain statements made in the Solicitor General's memorandum, so that his position can be understood.

There was in fact below but one criminal offense, which the State elected to attempt to charge in nine separate counts. This is proven by the fact that the second trial court finally permitted only one count to go to the jury.

The ninth count was not dismissed because of a repeal by the recent Montana Penal Code revision, but because the statute on which it had been predicated had been repealed long before that.

There is nothing in the record that reflects that Bretz withheld raising any issues pending the attachment of jeopardy, and in fact there are numerous references in briefs raising the point by Bretz that certain of these matters should be determined and resolved by the Court prior to the time jeopardy would attach. Specifically Bretz's counsel raised the point that the Court should grant his motions to dismiss, so that all of these questions could be taken by the State to the Montana Supreme Court prior to the time that jeopardy attached, and then be resolved by that court prior to trial.

Bretz's motion to restrict the factual proof to the period of time set forth in the information related to the fact and to a contention by Bretz that the particular crime involved did properly take place within the time frame set forth in that information, and related to the conclusion of the claim made to the Workmen's Compensation Board in Montana, by the filing of papers with that Board and the attaining of the funds at that time, and that proof and facts prior to that time were not proper.

Both sides applied to the Montana Supreme Court for supervisory control relief, and argued for the same which was there denied by the court.

The three counts were dismissed by the trial court, *sua sponte,* and over the specific objections by Bretz, which also included his specific statement that he was not waiving any rights he had thereto.

These facts, which are correct and are reflected by the record below, militate against, and destroy the factual position on which the Solicitor General's brief relies.

ARGUMENT

A. Is the Montana Statute that Jeopardy does not Attach until After the First Witness is Sworn Unconstitutional?

Bretz contends that the first two questions raised can properly be considered together and as stated above. This Montana statutory attempt to define when jeopardy attaches is unconstitutional under both the United States and Montana Constitutions. The Montana Legislature does not have the power to change the Constitution as interpreted by this Court.

Prior to 1969, *Palko v. Connecticut,* 302 U.S. 319, 87 L. Ed. 288, 58 S. Ct. 149 (1937) was the law of the land holding that the Fifth Amendment double jeopardy provision did not apply to the states, and they were free to then adopt their own rules thereon. Thus, in 1962 a Model Penal Code provision was proposed which

provided that jeopardy did not attach until the first witness was sworn. Montana adopted this provision in 1973 as the statute now in question. Thus, the 1964 Harvard Law Review cited in appellant's brief at page 10, the law from which is now out of date, this article did correctly predict *Benton,* below.

However, all this was changed in 1969 when *Palko* was specifically overruled in *Benton v. Maryland,* 395 U.S. 784, 23 L. Ed. 2d 707, 89 S. Ct. (1969), holding that:

> "The double jeopardy prohibition of the Fifth Amendment represents a fundamental ideal in our constitutional heritage, and that it should apply to the states through the Fourteenth Amendment. Insofar as it is inconsistent with this holding, Palko v. Connecticut is overruled.
>
> "Palko represented an approach to basic constitutional rights which this Court's recent decisions have rejected. It was cut of the same cloth as Betts v. Brady, 316 U.S. 455, 86 L. Ed. 1595, 62 S. Ct. 1252 (1942), the case which held that a criminal defendant's right to counsel was to be determined by deciding in each case whether the denial of that right was 'shocking to the universal sense of justice'. Id., at 462, 86 L. Ed. at 1602. It relied upon Twining v. New Jersey, 211 U.S. 78, 53 L. Ed. 97, 29 S. Ct. 14 (1908) which held that the right against compulsory self-incrimination was not an element of Fourteenth Amendment due process. Betts was overruled by Gideon v. Wainwright, 372 U.S. 335, 9 L. Ed. 2d 799, 83 S. Ct. 792, 93 ALR.2d 733 (1963); Twining, by Malloy v. Hogan, 378 U.S. 1, 12 L. Ed. 2d 653, 84 S. Ct. 1489 (1964). Our recent cases have thoroughly rejected the Palko notion that basic constitutional rights can be denied by the States as long as the totality of the circumstances does not disclose a denial of 'fundamental fairness'. Once it is decided that a particular Bill of Rights guarantee is 'fundamental to the American scheme of justice', Duncan v. Louisiana, supra, at 149, 20 L. Ed. 2d at 496, the same constitutional standards apply against both the State and Federal Governments. Palko's roots had thus been cut away years ago. We today only recognize the inevitable."

During argument in the cases below, appellant has conceded that *Benton* applies to Montana, but the argument has been made that this Court's holding that Fifth Amendment jeopardy attaches

when the jury has been empanelled and sworn does not apply to Montana until this Court specifically so holds. The Montana Supreme Court so held in *State v. Sheriff, et al,* 539 P.2d 1191 (1975), at page 1192, saying:

> ". . . in the absence of a definite ruling by the United States Supreme Court . . ."

which was Bretz's first appearance before that Court on this issue, and again in affirming Bretz's conviction on appeal in *State v. Cline, et al,* 555 P.2d 724 at page 735, saying:

> ". . . until this issue is finally resolved by a contrary decision of a higher federal appeals court . . ."

Bretz understands that appellant also concedes that the United States Supreme Court and all of the federal courts unanimously hold and agree that jeopardy attaches in all federal courts when the jury is empanelled and sworn. This ruling and the reasons therefore were just recently again set forth by this Court in *U.S. v. Martin Linen Supply Co.*, ____ U.S. ____, 51 L. Ed. 2d 642 (decided April 4, 1977), at page 649:

> " 'The development of the Double Jeopardy Clause from its common-law origins . . . suggests that it was directed at the threat of multiple prosecutions, not at Government appeals, at least where those appeals would not require a new trial.' Id., at 342, 43 L. Ed. 2d 232, 95 S. Ct. 1013. Thus Wilson held that the 'controlling constitutional principle' focuses on prohibitions against multiple trials. Id., at 346, 43 L. Ed. 2d 232, 95 S. Ct. 1013. At the heart of this policy is the concern that permitting the sovereign freely to subject the citizen to a second trial for the same offense would arm government with a potent instrument of oppression. The Clause, therefore, guarantees that the State shall not be permitted to make repeated attempts to convict the accused, 'thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity as well as enhancing the possibility that even though innocent he may be found guilty.' Green v. United States, 355 U.S. 184, 187-188, 2 L. Ed. 2d 199, 78 S. Ct. 221, 77 Ohio L. Abs. 202, 61 ALR.2d 1119 (1957); see also Downum v. United States, 372 U.S. 734, 736, 10 L. Ed. 2d 100, 83 S. Ct. 1033

> (1963). '(S)ociety's awareness of the heavy personal strain which a criminal trial represents for the individual defendant is manifested in the willingness to limit the Government to a single criminal proceeding to vindicate its very vital interest in enforcement of criminal laws.' United States v. Jorn, 400 U.S. 470, 479, 27 L. Ed. 2d 543, 91 S. Ct. 547 (1971) (Harlan, J.).
>
> "In animating this prohibition against multiple prosecutions, the Double Jeopardy Clause rests upon two threshold conditions. The protections afforded by the Clause are implicated only when the accused has actually been placed in jeopardy. Serfass v. United States, 420 U.S. 377, 43 L. Ed. 2d 265, 95 S. Ct. 1055 (1975). This state of jeopardy attaches when a jury is empanelled and sworn, or, in a bench trial, when the judge begins to receive evidence. Illinois v. Somerville, 410 U.S. 458, 471, 35 L. Ed. 2d 425, 93 S. Ct. 1066 (1973) (White, J., dissenting); Downum v. United States, supra."

This Court has recently heard and decided numerous cases involving jeopardy. However, these cases have principally arisen because of questions raised as to the government's right of appeal, which is now only restricted by this double jeopardy prohibition. This is truly the only concern of the Solicitor General's memorandum as filed herein, which is yet another illustration as to why such memorandum is not proper here. This appeal relates solely as to whether Bretz should have been subjected to a second prosecution after he had once been placed in jeopardy on the same charge. This constitutional guarantee is against being twice put to trial for the same offense as held in *Ex parte Lange,* 18 Wall. 163, 169, 21 L. Ed. 872 (1874) "the common law not only prohibited a second punishment for the same offense, but it went further and forbid a second trial for the same offense, whether the accused had suffered punishment or not, and whether in the former trial he had been acquitted or convicted."

This question was recently determined by this Court in *Adney v. United States,* ____ U.S. ____, 52 L. Ed. 2d 651, 97 S. Ct. ____, (decided June 9, 1977) as follows:

"Finally, the rights conferred on a criminal accused by the Double Jeopardy Clause would be significantly undermined if appellate review of double jeopardy claims were postponed until after conviction and sentence. To be sure, the Double Jeopardy Clause protects an individual against being twice convicted for the same crime, and that aspect of the right can be fully vindicated on an appeal following final judgment, as the Government suggests. However, this Court has long recognized that the Double Jeopardy Clause protects an individual against more than being subjected to double punishments. It is a guarantee against being twice put to *trial* for the same offense.

" ' "The Constitution of the United States, in the Fifth Amendment, declares, 'nor shall any person be subject (for the same offense) to be twice put in jeopardy of life or limb.' The prohibition is not against being twice punished, but against being twice *put* in jeopardy . . . " . . . The "twice put in jeopardy" language of the Constitution thus relates to a potential, i.e., the risk that an accused for a second time will be convicted of the "same offense" for which he was initially tried.' Price v. Georgia, 398 U.S. 323, 326, 26 L.Ed.2d 300, 90 S. Ct. 1757 (1970).

"See also United States v. Jorn, 400 U.S. 470, 479, 27 L. Ed. 2d 543, 91 S. Ct. 547 (1971); Green v. United States, 355 U.S. 184, 187-188, 2 L. Ed. 2d 199, 78 S. Ct. 221, 77 Ohio L. Abs. 202, 61 ALR.2d 1119 (1957); United States v. Ball, 163 U.S. 662, 669, 41 L. Ed. 300, 16 S. Ct. 1192 (1896). Because of this focus on the 'risk' of conviction, the guarantee against double jeopardy assures an individual that, among other things, he will not be forced, with certain exceptions, to endure the personal strain, public embarrassment, and expense of a criminal trial more than once for the same offense. It thus protects interests wholly unrelated to the propriety of any subsequent conviction. Justice Black aptly described the purpose of the clause:

" 'The underlying idea, one that is deeply ingrained in at least the Anglo-American system of jurisprudence, is that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty.' Green, supra, at 187-188, 2 L. Ed. 2d 199, 78 S. Ct. 221, 7 Ohio L. Abs. 202, 61 ALR.2d 1119.

"Accord, Breen v. Jones, 421 U.S. 519, 529-530, 44 L. Ed. 2d 346, 95 S. Ct. 1779 (1975); Serfass v. United States, 420 U.S. 377, 387-388, 43 L. Ed. 2d 265, 95 S. Ct. 1055 (1975); Jorn, supra, at 479, 27 L. Ed. 2d 543, 91 S. Ct. 547."

The facts raise a simple issue. In Bretz's first case, the jury was duly empanelled and sworn. The case thereafter was dismissed on motion of the State without his consent and over his objections that he was entitled to have the case tried before the jury then empanelled and sworn. Even though three counts had been dismissed by the trial court, *sua sponte*, there were still then five counts remaining. The position adopted by the State was that the Montana statute, *95-1711, R.C.M. 1947*, providing that jeopardy does not attach until after the first witness is sworn can change the constitutional double jeopardy clause and that jeopardy had not attached. The State filed the new information, and over Bretz's unsuccessful objections on the grounds of double jeopardy, he was tried, convicted and imprisoned. It is Bretz's position that under both the United States and Montana Constitutional provisions that jeopardy properly attached when the jury is empanelled and sworn and the Montana Statute is unconstitutional.

Thus, the question in this case is simply whether this Montana Statute is constitutional in view of the Fifth Amendment to the United States Constitution and the Montana Constitution, Article II, Section 25.

There are no cases by the Supreme Court of the United States which depart from this rule that jeopardy attaches when the jury is empanelled and sworn and this constitutional standard under "the law of the land" is thus established.

In the federal courts in Montana, the rule is the same. In *U.S. v. LeMay*, 330 F. Supp. 628, the court ruled that jeopardy attaches when a jury is empanelled and sworn, citing *Wade v. Hunter*, 336 U.S. 684, 93 L. Ed. 974, 69 S. Ct. 834. In 1971, the Honorable W.J. Jameson held in *U.S. v. Minyard*, quoting *22 C.J.S. 637, Criminal Law Section 241*, that jeopardy attaches when a jury is

empanelled and sworn. This is also the rule in the Ninth Circuit. See *Himmelfarb v. U.S.*, 175 F.2d 924, and *Howard v. U.S.*, 372 F.2d 294.

In Montana, under the 1889 constitutional clause, identical to the present clause in the 1972 Constitution, the highest court of Montana ruled to the same effect in *State v. Gaimos*, 162 Pac. 156, 53 Mont. 118.

The text authorities are no less explicit. See *Wharton's Criminal Evidence*, page 396; *22 C.J.S. Criminal Law 241; 15 Am. Jur. Criminal Law 40.*

In *Ex parte Bornee*, 76 W. Va. 360, 85 S.E. 529, the court said:

> "The West Virginia constitutional amendment of 1870-80, having for its purpose the revision of the judicial department, did not, wherein it provided that the supreme court should have 'such other appellate jurisdiction in both civil and criminal cases as may be prescribed by law,' give legislative power to alter the originally understood meaning of jeopardy in the Bill of Rights."

In *Booker v. Phillips*, 418 F.2d 434 (Kan. 1969), the court said:

> "Accordingly, it is now clear that the validity of the Appellate's conviction *must be judged* under the Federal double jeopardy standards." (Emphasis supplied.)

To the same effect is *Klinefelter v. Superior Court*, 502 P.2d 531 (Cal.).

In *Baker v. State*, 289 A.2d 348, (Md. 1972), the court said:

> "In state prosecutions as in federal prosecutions, double jeopardy must be applied in accordance with the Supreme Court's Constitutional construction and interpretations, from time to time of the Fifth Amendment Clause."

In *Bernard v. State*, 481 S.W.2d 427 (Tex. 1972), the court applied the rule and the standard adopted by the Supreme Court of the United States, even though there was a state statute that a higher prosecution was no bar if the proceeding was a misdemeanor.

Then there is the case of *People v. Scott*, 337 N.Y.S.2d 640 (1972).

"Appellant was convicted of criminally selling a dangerous drug in the third degree. His guilt was established beyond a reasonable doubt and we find no error during the trial to warrant a reversal. It is necessary, however, to discuss the appellant's motion to dismiss the indictment on the ground that he was being subjected to double jeopardy. On December 1, 1971, after four jurors had been selected and sworn, the court granted People's motion for a mistrial on the ground that an indispensable witness was out of the state and would not be available for the trial. On January 3, 1972, when the case was again called for trial, appellant moved to dismiss the indictment on the ground that he was being subjected to double jeopardy, contending that the trial had commenced by the previous selection of four jurors. In support of that claim, appellant relied on section 260.30 of the Criminal Procedure Law which, in prescribing the order in which a jury shall proceed, provides: '1. The jury must be selected and sworn.' However, in view of other sections of the Criminal Procedure Law directed specifically to the subject of double jeopardy, we think the section relied on by appellant is neither relevant nor determinative. Prior to the adoption of the Criminal Procedure Law, the traditional double jeopardy rule in New York was that a person was not placed in jeopardy until the jury had been examined and sworn and evidence given (Matter of Bland v. Supreme Court, 20 N.Y.2d 552, 554, 285 N.Y.S.2d 597, 598, 232 N.E.2d 633, 634.) The new criminal procedure statute, effective September 1, 1971, includes section 40.20, which provides that a person may not be twice prosecuted for the same offense. (N.Y. Const., Art. I, Section 6). By way of implementation of this provision, Section 40.30, subd. 1(b) states that a person 'is prosecuted' for an offense within the meaning of section 40.20, when the action proceeds to the trial state and a witness is sworn. By this provision it is clear that, under the Criminal Procedure law, jeopardy attaches, not on the selection and swearing of the jury as described in section 260.30, but on the subsequent swearing of a witness, as provided in section 40.30. There is another consideration which must be borne in mind in resolving a claim of double jeopardy. Under Benton v. Maryland, 395 U.S. 784, 89 S. Ct. 2056, 23 U.S. 734, 83 S. Ct. 1033, 10 L. Ed. 2d 100, holding that jeopardy attaches when a jury has been impaneled and sworn, is now applicable to state prose-

cutions. In Benton the court found at page 794, 89 S. Ct. at page 2062, 'that the double jeopardy prohibition of the Fifth Amendment represents a fundamental ideal in our constitutional heritage and that it should apply to the state through the Fourteenth Amendment.' In view of these decisions, Criminal Procedure Law 40.30 should be amended to comply with the rule of Downum."

The rationale for jeopardy attaching at this point is well discussed in *Smith v. State of Mississippi*, 478 F.2d 88 at page 93:

"The respondent's contention that petitioner was not 'put to trial' or was in no way prejudiced by the dismissal of the proceedings before testimony was presented has been decided adversely to it by the Supreme Court in Downum v. United States, 372 U.S. 734, 10 L. Ed. 2d 100, 83 S. Ct. 1033 (1963), and recently reaffirmed in Illinois v. Somerville, 410 U.S. 458, 35 L. Ed. 2d 425, 93 S. Ct. 1066 (1973). In both cases the Supreme Court held that jeopardy attached when the first jury was selected and sworn. The mere introduction of evidence has no spontaneous effect on a defendant which can be said to automatically charge him with an appreciable degree of insecurity once he has made the preparations for trial and selected those of his peers who will determine his fate."

All trial lawyers recognize that their pre-trial preparations must be long completed and that they are all the way in the water by the time the jury has been selected.

In *McNeal v. Hollowell*, 481 F.2d 1145 (1973), the court stated as follows:

"The law regarding double jeopardy has recently been carefully reviewed and explained by the Supreme Court in Illinois v. Somerville, 1973, 410 U.S. 458, 93 S. Ct. 1066, 35 L. Ed. 2d 425, and by this Court in Smith v. Mississippi, 5 Cir. 1973, 478 F.2d 88. Therefore, with reference to these two cases we refrain from treating in extenso all of the principles and policies inherent in the theory of double jeopardy and instead direct our attention to the particular factors which have a bearing on the resolution of the issue before us.

"(1) The Fifth Amendment's proscription against placing a person in jeopardy twice for the same offense has been applied to the states through the Due Process Clause of the Fourteenth Amendment and this application must be made retroactively. Benton v. Maryland, 1969, 395 U.S. 784, 89 S. Ct. 2056, 23 L. Ed. 2d 707, see Price v. Georgia, 1970, 398 U.S. 323, 331 N. 9, 90 S. Ct. 1747, 25 L. Ed. 2d 300; Ashe v. Swenson, 1970, 397 U.S. 436, 437, N. 1, 90 S. Ct. 1189, 25 L. Ed. 2d 469; Waller v. Florida, 1970, 397 U.S. 387, 391, n. 2, 90 S. Ct. 1184, 25 L. Ed. 2d 435; North Carolina v. Pearce, 1969, 395 U.S. 711, 89 S. Ct. 2082, 23 L. Ed. 2d 656; Galloway v. Beto, 5 Cir. 1970, 421 F.2d 284, cert. den. 400 U.S. 912, 91 S. Ct. 137, 27 L. Ed. 2d 251.

"(2) Because '(t)he prohibition is not against being twice punished, but against being twice put in jeopardy,' United States v. Gall, 1896, 183 U.S. 662, 669, 16 S. Ct. 1192, 1194, 41 L. Ed. 300, it is necessary to determine when jeopardy attaches in a jury trial. In Downum v. United States, 1963, 372 U.S. 734, 83 S. Ct. 1033, 10 L. Ed. 2d 100, the Supreme Court recognized that this occurs when the jury is impaneled and sworn, thus vesting the defendant with the valued right to have his trial completed before that tribunal and that jury. See Wade v. Hunter, 1949, 336 U.S. 684, 689, 69 S. Ct. 834, 93 L. Ed. 974."

See also *Curry v. Superior Court of the City and County of San Francisco*, 87 Cal. Rep. 361, 470 P.2d 345 (1970), wherein the Supreme Court of California was construing Article I, Section 13 of the California Constitution which states "No person shall be *twice put in jeopardy for the same offense* ..." The Court in *Curry* construed this section as follows:

"Article I, section 13, of the California Constitution declares that 'No person shall be twice put in jeopardy for the same offense ***.' Implementing this constitutional command, the decisions of this court have settled the now familiar rules that (1) jeopardy attaches when a defendant is placed on trial in the court of competent jurisdiction, on a valid accusatory pleading, before a jury duly impaneled and sworn, and (2) a discharge of that jury without a verdict is equivalent in law to an acquittal and bars a retrial, unless the defendant consented thereto or legal necessity required it. (Paulson v. Superior Court (1962) supra, 68 Cal.2d 1, 5, 22 Cal. Rep. 649, 372

P.2d 641; Cardenas v. Superior Court, (1961) 56 Cal.2d 273, 275, 14 Cal. Rep. 657, 363 P.2d 889; Jackson v. Superior Court (1937) 10 Cal.2d 350, 352-357, 74 P.2d 243, and cases cited; see also Pen. Code § § 654, 687, 1023, 1140, and 1141.)

"In the case at bar the record demonstrates that at the time the court declared a mistrial and discharged the jury, jeopardy had attached pursuant to the foregoing rules; the sole remaining issues, therefore, are consent and legal necessity.

"At no time did petitioner, in person or through counsel, expressly consent to the granting of the mistrial or the discharge of the jury. The People maintain that petitioners impliedly gave such consent, but the contention does not withstand analysis. When a trial court proposes to discharge a jury without legal necessity therefor, the defendant is under no duty to object in order to claim the protection of the constitutional guarantee, and his mere silence in the face of an ensuing discharge cannot be deemed a waiver."

If there was any question previously as to when jeopardy attaches in a jury case, the U.S. Supreme Court has just recently laid this question to rest. In *Serfass v. U.S.*, 420 U.S. 337 (1975), the question to be decided was the:

> "point in criminal proceedings at which the constitutional purposes and policies are implicated by resort to the concept of 'attachment of jeopardy.' "

and the Court held that:

> "In the case of a jury trial jeopardy attaches when a jury is empaneled and sworn."

In *Brown v. Ohio*, 45 L.W. 4697 (decided June 16, 1977), this Court reversed the Ohio court's determination that double jeopardy did not apply because joy riding and auto theft were claimed to be two separate offenses.

This position was also recognized in *Lee v. U.S.*, 45 L.W. 4661 (decided June 13, 1977), in Note 3 as follows:

> "As this was a bench trial, jeopardy did not attach until the court began to hear evidence. Serfass v. U.S., 420 U.S. 377, 388 (1975)."

The law as decided by this Court, by all federal court decisions we have located, and by every state court decision we have located, with the exception of Montana and possibly Arizona, all agree that jeopardy attaches when a jury is empanelled and sworn. This is a constitutional right, and Bretz respectfully contends that the State of Montana has no power to adopt a different standard. As a citizen of Montana, Bretz is entitled to the same constitutional protections he would have if present in any one of the other states. This Montana statute is unconstitutional.

B. The Solicitor General's Memorandum as *Amicus Curiae* is not proper and Should Not be Considered.

The Solicitor General's office was courteous in advising that his office intended to file a memorandum for the United States as *amicus curiae* so that Bretz was then able to secure an extension of time to file this brief and which permits him to reply to the Solicitor General's Memorandum received July 28, 1977. This memorandum takes "no position" on the first two questions presented as to the constitutionality of the Montana statute which states that jeopardy does not attach until after the first witness has been sworn, stating "We do not address the first — the time at which jeopardy attaches — because this Court's decision is not likely to affect the interests of the United States". (Sol. Gen. Mem. p. 1), and discusses only the third question presented by appellant, which is:

> "3. Assuming that this Court were to hold that jeopardy attaches in state proceedings when the jury is sworn, does the doctrine of 'manifest necessity' nevertheless require that a trial be held?"

Bretz objects to any consideration of such memorandum for the following reasons:

(1) As raised by appellee Cline's motion to dismiss or affirm, which was adopted by reference in appellee Bretz's motion to affirm, any question as to "manifest necessity" does not involve a state statute held by a court of appeals to be unconstitutional

which is one of the requirements of *28 U.S.C.A. 1254(2)*, the statute relied on by appellant for the jurisdiction of this Court for this direct appeal. This statute also requires that any such "review on appeal shall be restricted to the federal questions presented". This Court's practice is to strictly construe statutes authorizing appeals. *Fornaris v. Ridge Tool Co.*, 400 U.S. 41, 27 L.Ed.2d 174, 91 S. Ct. 156 (Puerto Rico, 1970).

(2) Any question as to manifest necessity was never presented to or ruled upon by any state court in this action. This double jeopardy question was presented by Bretz to the State District Trial Court, the Montana Supreme Court by an application for a writ of habeas corpus, and finally by appeal to the Montana Supreme Court and in none of these did the State raise this issue. As noted on page 14 of appellant's brief, this question was not ruled upon by any of these State Courts and appeared for the first time in the Federal District Court decision.

(3) This third issue has been abandoned by the appellant. As shown by page 14 of appellant's brief, this issue appears to have been specifically abandoned by appellant and is not a proper subject for consideration here. Bretz agrees with the Solicitor General's statement that "their approach (appellant's) amounts to an abandonment of the question". If appellant has not specifically abandoned the same, this issue has been foreclosed by their failure to brief the same. Supreme Court Rule 40.,1.,(g) requires that the brief contain "The argument, exhibiting clearly the points of fact and of law being presented, citing the authorities and statutes relied upon". Only errors assigned will be considered. *U.S. v. Crescent Amusement Co.*, 323 U.S. 173, 89 L.Ed. 160, 655 S. Ct. 254 (Tenn. 1944), rehearing denied, 323 U.S. 818, 89 L.Ed. 650, 65 S. Ct. 734, and matters not argued need not be considered. *I.T.S. Rubber Co. v. Essex Rubber Co.*, 272 U.S. 429, 71 L.Ed. 355, 45 S. Ct. 136 (Mass. 1926). In the *New Haven Inclusion Cases*, 399 U.S. note 78 at page 481, 392, 26 L.Ed.2d 691, 90 S. Ct. 2065, this Court held that "The Committee has not revived the issue in its brief, nor has it responded in its reply brief to the government's contention that it has abandoned the claim. Accordingly, we do not consider

the matter further".

(4) The record does not contain a transcript of the State Court proceedings nor the principal portion of the pleadings therein, and the Solicitor General's Memorandum contains erroneous assumptions of facts thereon. See certain of these errors pointed out below. Bretz agrees with the Solicitor General's statement on this that "the record in this case appears to be inadequate to permit consideration . . ."

(5) *Amicus curiae* must take the case as it is and cannot expand on the issues presented to the Court. He is not a party to the action. *Court v. Sanduski*, C.A.. Ill. 206 F.2d 915; *Alexander v. Hall*, D.C.S.C., 64 F.R.D. 152. He cannot assume the functions of a party. *Kemp v. Rubin*, 64 N.Y.S.2d 510, 187 Misc. 707. He cannot take upon himself the management of the action as counsel, and has no control over the proceedings. *State ex rel Bennett v. Bonner*, 214 P.2d 747, 123 Mont. 414. He takes the case as he finds it, with the issues made by the parties, and cannot raise separate issues. *State ex rel Kvallen v. Graybill*, 496 P.2d 1127, ___ Mont. ___ . *Anderson v. Smith*, 148 So. 2d 243 (Ala.) holds that where an appellant waived an assignment of error, the same could not be injected into a Supreme Court review of that case by any action on the part of *amicus curiae*. *Amicus curiae* has no right to create, extend or enlarge issues. *City of Tempe v. Prudential Ins. Co. of America*, 510 P.2d 745, 109 Ariz. 429, app. dism., 414 U.S. 1088, 38 L.Ed.2d 546, 94 S. Ct. 717.

C. Manifest Necessity does not Allow a Second Trial After Jeopardy had Properly Attached.

As noted above, Bretz contends that this question is not properly before the Court, and the Solicitor General's Memorandum should not be considered thereon.

A leading United States Supreme Court decision on this point is *Illinois v. Somerville*, 410 U.S. 458, 93 S. Ct. 1066, 35 L.Ed.2d 425. The basis for those certain recognized exceptions

to this general rule are ably discussed beginning at page 1069 of 93 S. Ct.

"The fountainhead decision construing the Double Jeopardy Clause in the context of a declaration of a mistrial over a defendant's objections is United States v. Perez, 9 Wheat. 579 (1824). Mr. Justice Story, writing for a unanimous Court, set forth the standards for determining whether a retrial, following a declaration of a mistrial over a defendant's objection, constitutes double jeopardy within the meaning of the Fifth Amendment. In holding that the failure of the jury to agree on a verdict of either acquittal or conviction did not bar retrial of the defendant. Mr. Justice Story wrote:

" 'We think, that in all cases of this nature, the law has invested Courts of justice with the authority to discharge a jury from giving any verdict, whenever, in their opinion, taking all the circumstances into consideration, there is a manifest necessity for the act, or the ends of public justice would otherwise be defeated. They are to exercise a sound discretion on the subject; and it is impossible to define all the circumstances, which would render it proper to interfere. To be sure, the power ought to be used with the greatest caution, under urgent circumstances, and for very plain and obvious causes; and, in capital cases especially, Courts should be extremely careful how they interfere with any of the chances of life, in favour of the prisoner. But, after all, they have the right to order the discharge; and the security which the public have for the faithful, sound, and conscientious exercise of this discretion rests, in this, as in other cases, upon the responsibility of the Judges, under their oaths of office.' Id., at 580.

"This formulation, consistently adhered to by this Court in subsequent decisions, abjures the application of any mechanical formula by which to judge the propriety of declaring a mistrial in the varying and often unique situations arising during the course of a criminal trial. The broad discretion reserved to the trial judge in such circumstances has been consistently reiterated in decisions of this Court. In Wade v. Hunter, 336 U.S. 684, 69 S. Ct. 834, 93 L.Ed. 974 (1949), the Court, in reaffirming this flexible standard, wrote:

" 'We are asked to adopt the Cornero (v. United States, 48 F.2d 69) rule under which petitioner contends the absence of witnesses can never justify discontinuance of a trial. Such a rigid formula is inconsistent with the guiding principles of the Perez decision to which we adhere. Those principles command courts in considering whether a trial should be terminated without judgment to take "all circumstances into account" and thereby forbid the mechanical application of an abstract formula. The value of the Perez principles thus lies in their capacity for informed application under widely different circumstances, without injury to defendants or to the public interest.' Id., at 691, 69 S. Ct. at 838.

"Similarly in Gori v. United States, 367 U.S. 364, 81 S. Ct. 1523, 6 L.Ed.2d 901 (1961), the Court again underscored the breadth of a trial judge's discretion, and the reasons therefor, to declare a mistrial.

" 'Where, for reasons deemed compelling by the trial judge, who is best situated intelligently to make such a decision, the ends of substantial justice cannot be attained without discontinuing the trial, a mistrial may be declared without the defendant's injections, and he may be retried consistently with the Fifth Amendment.' Id., at 368, 81 S. Ct., at 1526.

"In reviewing the propriety of the trial judge's exercise of his discretion, this Court, following the counsel of Mr. Justice Story, has scrutinized the action to determine whether, in the context of that particular trial, the declaration of a mistrial was dictated by 'manifest necessity' or the 'ends of public justice'. The interests of the public in seeing that a criminal prosecution proceed to verdict, either of acquittal or conviction, need not be forsaken by the formulation or application of rigid rules that necessarily preclude the vindication of that interest. This consideration, whether termed the 'ends of public justice,' United States v. Perez, supra, at 580 of 22 U.S. or, more precisely, 'the public's interest in fair trials designed to end in just judgments,' Wade v. Hunter, supra, at 689 of 336 S. Ct. has not been disregarded by this Court.

"In United States v. Perez, supra, and in Logan v. United States, 144 U.S. 263, 12 S. Ct. 617, 36 L.Ed. 429 (1892), this Court held that 'manifest necessity' justified the discharge of juries unable to reason verdict, and, therefore,

the Double Jeopardy Clause did not bar retrial. Cf. Keerl v. Montana, 213 U.S. 135, 29 S. Ct. 469, 53 L.Ed. 734 (1909); Dreyer v. Illinois, 187 U.S. 71, 23 S. Ct. 28, 47 L.Ed. 79 (1902). In Simmons v. United States, 142 U.S. 148, 12 S. Ct. 171, 35 L.Ed. 968 (1891), a trial judge dismissed the jury, over defendant's objections, because one of the jurors had been acquainted with the defendant, and, therefore, was probably prejudiced against the Government; this Court held that the trial judge properly exercised his power 'to prevent the defeat of the ends of public justice.' Id., at 154, 12 S. Ct., at 172. In Thompson v. United States, 155 U.S. 271, 15 S. Ct. 73, 39 L.Ed. 146 (1894), a mistrial was declared after the trial judge learned that one of the jurors was disqualified, he having been a member of the grand jury that indicted the defendant. Similarly, in Lovato v. New Mexico, 242 U.S. 199, 37 S. Ct. 107, 61 L.Ed. 244 (1916), the defendant demurred to the indictment, his demurrer was overruled, and a jury sworn. The district attorney, realizing that the defendant had not pleaded to the indictment after the demurrer had been overruled, moved for the discharge of the jury and arraignment of the defendant for pleading; the jury was discharged, the defendant pleaded not guilty, the same jury was again impaneled, and a verdict of guilty rendered. In both of those cases this Court held that the Double Jeopardy Clause did not bar reprosecution.

"(2) While virtually all of the cases turn on the particular facts and thus escape meaningful categorization, see Gori v. United States, supra; Wade v. Hunter, supra, it is possible to distill from them a general approach, premised on the 'public justice' policy enunciated in United States v. Perez, to situations such as that presented by this case. A trial judge properly exercises his discretion to declare a mistrial if an impartial verdict cannot be reached, or if a verdict of conviction could be reached but would have to be reversed on appeal due to an obvious procedural error in the trial. If an error would make reversal on appeal a certainty, it would not serve 'the ends of public justice' to require that the Government proceed with its proof when, if it succeeded before the jury, it would automatically be stripped of that success by an appellate court. This was substantially the situation in both Thompson v. United States, supra, and

Lovato v. New Mexico, supra. While the declaration of a mistrial on the basis of a rule or a defective procedure that would lend itself to prosecutorial manipulation would involve an entirely different question, cf. Downum v. United States, supra, such was not the situation in the above cases or in the instant case.

"In Downum v. United States, the defendant was charged with six counts of mail theft, and forging and uttering stolen checks. A jury was selected and sworn in the morning, and instructed to return that afternoon. When the jury returned, the Government moved for the discharge of the jury on the ground that a key prosecution witness, for two of the six counts against defendant, was not present. The prosecution knew, prior to the selection and swearing of the jury, that this witness could not be found and had not been served with a subpoena. The trial judge discharged the jury over the defendant's motions to dismiss two counts for failure to prosecute and to continue the other four. This Court, in reversing the convictions on the ground of double jeopardy, emphasized that '(e)ach case must turn on its facts,' 372 U.S., at 737, 83 S. Ct., at 1035 and held that the second prosecution constituted double jeopardy, because the absence of the witness and the reason therefor did not there justify, in terms of 'manifest necessity', the declaration of a mistrial.

"In United States v. Jorn, supra, the Government called a taxpayer witness in a prosecution for willfully assisting in the preparation of fraudulent income tax returns. Prior to his testimony, defense counsel suggested he be warned of his constitutional right against compulsory self-incrimination. The trial judge warned him of his rights, and the witness stated that he was willing to testify and that the Internal Revenue Service agent who first contacted him warned him of his rights. The trial judge, however, did not believe the witness' declaration that the IRS had so warned him, and refused to allow him to testify until after he had consulted with an attorney. After learning from the Government that the remaining four witnesses were 'similarly situated', and after surmising that they, too, had not been properly informed of their rights, the trial judge declared a mistrial to give the witnesses the opportunity to consult with attorneys. In sustaining a plea in bar of double

jeopardy to an attempted second trial of the defendant, the plurality opinion of the Court, emphasizing the importance to the defendant of proceeding before the first jury sworn, concluded:

" 'It is apparent from the record that no consideration was given to the possibility of a trial continuance; indeed, the trial judge acted too abruptly in discharging the jury that, had the prosecutor been disposed to suggest a continuance, or the defendant to object to the discharge of the jury, there would have been no opportunity to do so. When one examines the circumstances surrounding the discharge of this jury, it seems abundantly apparent that the trial judge made no effort to exercise a sound discretion to assure that, taking all the circumstances into account, there was manifest necessity for the sua sponte declaration of this mistrial. United States v. Perez, 9 Wheat., at 580. Therefore, we must conclude that in the circumstances of this case, appellee's reprosecution would violate the double jeopardy provision of the Fifth Amendment.' 400 U.S., at 487, 91 S. Ct., at 558.' "

A 1971 Montana Federal District Court case, *U.S. v. LeMay*, 330 F. Supp. 628, has striking similarities, and we quote from this decision at length:

"If an indictment is sufficient to support a conviction, jeopardy is held to attach when a jury is impaneled and sworn. Crawford v. United States, 109 U.S. App. D.C., 219, 285 F.2d 661, (1960), citing Wade v. Hunter, 336 U.S. 684, 69 S. Ct. 834, 93 L.Ed. 974 (1940). There are, however, exceptions to this general rule. In United States v. Perez, 9 Wheat. 479, 22 U.S. 579, 6 L.Ed. 165 (1824), the Supreme Court of the United States held that discharge of the jury after they were unable to reach a verdict did not bar a future trial for the same offense. In Wade v. Hunter, supra, the Court relying on the Perez decision held that the double jeopardy provision of the Fifth Amendment did not require that a defendant be permitted to go free in every case in which a trial failed to end in a final judgment. The Court cited the Perez language, which indicated that, if a manifest necessity for dismissal of the jury prior to a final verdict existed, there would be no bar to a future trial for the same offense.

"The manifest necessity for dismissal of the jury without a verdict was found in Brock v. North Carolina, 344 U.S. 424, 73 S. Ct. 439, 97 L.Ed. 456 (1953), in the refusal of the state's witnesses to testify against the defendant. In affirming the trial court's denial of the defendant's plea of double jeopardy, the Court said:

" 'This court has long favored the rule of discretion in the trial judge to declare a mistrial and to require another panel to try the defendant if the ends of justice will best be served.' Brock, at 427, 73 S. Ct. 349, at 350.

"In United States v. Chase, 372 F.2d 453 (4th Cir. 1967), the defendant moved for a mistrial on the basis of jury prejudice from a newspaper article found in the jury room. A new trial was granted and one of the jury-trial defendants moved for dismissal on the basis of double jeopardy. Another of the jury-trial defendants did not move for a mistrial and neither of the non-jury trial defendants asked for severance of the case. The Court there found a necessity in dismissing the case as to all of the defendants, both jury and non-jury, because of the effect on the defendants on a jury trial of any decisions rendered as to the defendants on the non-jury trial.

"The finding of a manifest necessity is not automatic, however. In Cornero v. United States, 48 F.2d 69 (9th Cir. 1931), the United States Attorney failed to have his witnesses present for the trial. The court dismissed the jury and a new jury was later impaneled for trial. The defendant thereupon pleaded that he was placed in double jeopardy. The Ninth Circuit recognized that jeopardy attaches when the jury is impaneled, with certain exceptions. It denied the Government's claim that this particular case fell within those exceptions.

"The Court, relying on the fact that the District Attorney had suggested the impaneling of the jury, knowing that his witnesses were not present, said:

" 'We are here dealing, however, with a fundamental right of a person accused of crime, guaranteed to him by the Constitution, and such right cannot be frittered away or abridged by general rules concerning the importance of advancing public justice * * * (N)o court has gone to the extent of holding that, after the impanelment of the jury for

the trial of a criminal case, the failure of the district attorney to have present sufficient witnesses, or evidence to prove the offenses charged, is an exception to the rule that the discharge of a jury after its impanelment for the trial of a criminal case operates as a protection against a retrial of the same cause.' Cornero, at 71.

"The Supreme Court in Downum v. United States, 372 U.S. 734, 83 S. Ct. 1033, 10 L.Ed.2d 100 (1963), upheld the ruling of the Ninth Circuit Court of Appeals in the Cornero case, quoting the above language in its opinion. In view of this precedent, the issue to be resolved in the instant case is whether there existed a manifest necessity, within the meaning of Wade, for dismissal of the jury or whether the case falls within the confines of Downum and Cornero.

"Three factors weigh heavily in deciding this issue. The United States Attorney drew the indictment and should have known the offense occurred in Brockton and not Poplar. The United States Attorney could have dismissed the indictment and obtained a correct indictment before the jury was impaneled and sworn, without any prejudice to his case. United States v. Kimbrew, 380 F.2d 538 (6th Cir. 1967). The first indictment would have supported a conviction if the United States Attorney had proceeded with his case, since the verdict would have cured the variance and the variance would not have been misleading to the defendant. Ledbetter v. United States, supra; United States v. Ansani, supra.

"When these facts are considered, the theory of the United States Supreme Court in United States v. Jorn, 400 U.S. 470, 91 S. Ct. 547, 27 L.Ed.2d 543 (1971), must be considered in determining whether a manifest necessity existed for dismissal of the jury without a verdict. In that case, the Court held that in the absence of a motion for dismissal by defendant the rule of Perez is a

"' • • • command to trial judges not to foreclose the defendant's option (to have the original jury decide his fate) until a scrupulous exercise of judicial discretion leads to the conclusion that the ends of public justice would not be served by a continuation of the proceedings.' Jorn, at 485, 91 S. Ct. at 557.

"The Court distinguished the actions of the trial court in Jorn from those of the trial court in Gori v. United States, 367 U.S. 364, 81 S. Ct. 1523, 6 L.Ed.2d 901 (1961). In Gori, the trial court was held to have acted within its discretion in stopping the trial when it appeared to it that the prosecution's improper questioning would seriously prejudice defendant. In Jorn, on the other hand, the trial court dismissed the jury so that government witnesses could confer with their attorneys before answering more questions, even though the prosecution advised the court that the witnesses had been fully advised of their right to refuse to testify where their answers would be self-incriminating. The trial court then dismissed a subsequent information against the same defendants because of former jeopardy.

"In comparing the facts of Jorn with those of Gori, the Court found that under any circumstances the action of the trial court in Jorn was not taken for the benefit of the defendant, as it had been in Gori. Therefore, the ruling in Gori was not controlling.

"In regard to the issue of abuse of discretion by the trial court, the Jorn Court said:

" 'Reprosecution after a mistrial has unnecessarily been declared by the trial court obviously subjects the defendant to the same personal strain and insecurity regardless of the motivation underlying the trial judge's action.' Jorn, 400 U.S. at 483, 91 S. Ct. at 556.

"Finally, the Court concluded that the trial court abused its discretion in discharging the jury without the consent of the defendant and that his action was therefore a bar to further prosecution.

"In terms of the Gori decision, the dismissal of the first indictment in the instant case cannot be said to have been necessary to prevent an injustice. Gori, 367 U.S. at 368, 81 S. Ct. 1523, rather, it was done only after the United States Attorney announced that he was not ready to proceed. On the basis of the Supreme Court decisions, including Jorn, to allow the defendant a 'manifest necessity' must have existed for the dismissal. Unless that necessity existed, the Fifth Amendment prevents a trial on the new indictment.

"(5) As stated in Wade, there is no rigid rule to determine when former jeopardy will bar further prosecution. Each

case must be decided after a careful consideration of all its facts.

"(6) The facts that must be considered in this case prevent the finding of a manifest necessity. The error in the indictment was not misleading to the defendant and, since the whole record is available to defendant, a conviction would not have left her open to additional charges for the same offense. In addition, the Government, which originally drew the indictment, could have moved for dismissal of the indictment before the jury was sworn and impaneled without endangering prosecution on a corrected indictment issued by a grand jury.

"Thus, the government allowed two permissible alternatives for correcting the error in the indictment to go unused and chose the one method which was closed to it. Rather than showing a 'manifest necessity' for dismissal of the jury, these facts appear to bring the case within the Downum decision. As in Downum, the prosecution allowed the jury to be sworn with knowledge that it did not have a proper indictment and that the proof would be different from the facts charged.

"(7) If, however, the defendant can be said to have agreed to the dismissal of the jury, then she waived her right to claim double jeopardy on the second indictment. Green v. United States, 355 U.S. 184, 78 S. Ct. 221, 2 L.Ed.2d 199 (1957); Raslich v. Bannan, 273 F.2d 420 (6th Cir. 1959); Haugen v. United States, 153 F.2d 850 (9th Cir. 1946).

"In United States v. Armco Steel Corp., 252 F. Supp. 364 (S.C. Cal. 1966), the court held that the right of the defendant to not be placed in double jeopardy can be waived, but that it must be shown that there was an intentional relinquishment of a known right or privilege. Citing Himmelfarb v. United States, 175 F.2d 924 (9th Cir. 1949).

"In Himmelfarb, the Ninth Circuit Court of Appeals held that '(i)n the absence of express authority, an attorney has no power to surrender substantial legal rights of his client.' Himmelfarb at 931. The court went on to add that such consent should appear on the minutes and that the absence of rejection of the waiver does not preclude the defendant from pleading double jeopardy. See also, United States v.

El Rancho Adolphus Products, Inc., 140 F. Supp. 645 (M.D. Pa. 1956), aff. 3 Cir., 243 F.2d 367.

"A review of the record reveals that the defendant did not specifically waive her right to protection against double jeopardy and rather that her counsel specifically stated that he wished not to be considered as having made any proceedings which would waive the plea of double jeopardy.

"The motion by defendant to dismiss the original indictment was based on the failure of the Government to proceed with the case. The court granted the motion by the government to dismiss rather than the motion by the defendant. Therefore, the defendant cannot be said to have concurred in the dismissal of the jury without a verdict so as to have waived her right to plead double jeopardy to a later indictment on the same offense. Defendant's motion must be treated as a motion to dismiss for failure to prosecute.

"It is the opinion of the court, therefore, that the original indictment was sufficient to support a conviction on the proof which would have been offered, that the defendant would not have been misled nor placed in danger of conviction twice for the same offense, that there was not a manifest necessity for the motion of the United States to dismiss, so as to outweigh the guarantee of the Fifth Amendment against double jeopardy, and that the defendant did not concur in the motion of the United States to dismiss the indictment.

"It is therefore ordered and adjudged that the motion of the defendant is granted and the charges against her are dismissed."

The Solicitor General's memorandum relies on *Lee v. United States*, cited above, but this is based on an erroneous factual foundation. This citation from *Lee* at 45 L.W. 4663 supports Bretz's position:

"We conclude that the distinction between dismissals and mistrials has no significance in the circumstances here presented and that established double jeopardy principles governing the permissibility of retrial after a declaration of mistrial are fully applicable.

"When the District Court terminated the first trial in this case it did not act *sua sponte* but in response to a motion by

defense counsel. In *United States v. Dinitz*, we examined the permissibility of retrial in an analogous situation where the trial court had granted a defense motion for mistrial.

"In that case, after jeopardy had attached but well before verdict, the trial judge had excluded one of the defendant's lawyers from the courtroom for repeatedly disregarding his instructions. The defendant's remaining lawyer moved for a mistrial and the court granted the motion. The defendant was indicted again on the same charge, his double jeopardy claims were rejected, and he was convicted. When the double jeopardy issue reached this Court, we held that the defendant's second trial on the same charge did not violate the Fifth Amendment.

"Writing for the Court, Mr. Justice Stewart reiterated the rule that 'where circumstances develop not attributable to prosecutorial or judicial overreaching, a motion by the defendant for mistrial is ordinarily assumed to remove any barrier to reprosecution, even if the defendant's motion is necessitated by prosecutorial or judicial error.' *Id.*, at 607, quoting *United States v. Jorn*, 400 U.S., at 485 (plurality opinion). Recognizing that a prejudicial error committed by court or prosecutor generally presents the defendant with a 'Hobson's choice', Mr. Justice Stewart nevertheless stressed the importance of preserving the defendant's 'primary control over the course to be followed in the event of such error.' *Id.*, at 609.

" 'Even when judicial or prosecutorial error prejudices a defendant's prospects of securing an acquittal, he may nonetheless desire "to go to the first jury and, perhaps, end the dispute then and there with an acquittal". *United States v. Jorn, supra*, at 484. Out prior decisions recognize the defendant's right to pursue this course in the absence of circumstances of manifest necessity requiring a *sua sponte* judicial declaration of mistrial. But it is evident that when prejudicial or prosecutorial error seriously prejudices a defendant, he may have little interest in completing the trial and obtaining a verdict from the first jury. The defendant may reasonably conclude that a continuation followed by a lengthy appeal and, if a reversal is secured, by a second prosecution. In such circumstances, a defendant's mistrial request has objectives not unlike the interests served by the Double Jeopardy Clause — the avoidance of the anxiety,

expense, and delay occasioned by multiple prosecutions.' *Id.*, at 608.

"Where the defendant, by requesting a mistrial, exercised his choice in favor of terminating the trial, the Double Jeopardy Clause generally would not stand in the way of reprosecution . . ."

In this case below, one of the nine counts was dismissed by the State because the statute on which it had been based had been repealed long before. This dismissal was prior to the attachment of jeopardy. Then the Court, of its own motion, dismissed three counts. This left five counts on which a jury had been selected, empanelled and sworn, and on which the State had taken the position that it had sufficient evidence to convict, and that it was ready for trial. Over specific objections by Bretz, the State dismissed these counts, and over Bretz's specific position that he was then entitled to go to trial before this jury and on these counts. As noted in *Lee*, the defendant Bretz did not control the course of the action taken by the trial court, and in fact the opposite was true and the course was controlled entirely by the trial court and by the prosecution, and over his objections thereto.

In any event, manifest necessity is not properly found here.

CONCLUSION

The Montana statute is unconstitutional. Jeopardy attached when the jury was empanelled and sworn, and the second prosecution was barred by the Fifth Amendment Double Jeopardy Clause. Appellant has abandoned its third question presented as to manifest necessity and this should not be considered. As the *amicus curiae* memorandum by the Solicitor General relates only to this third question, the same is not proper and should not be considered.

Respectfully submitted,

MOSES, TOLLIVER & WRIGHT

By /s/Charles F. Moses
CHARLES F. MOSES
Counsel for Appellee
L. R. BRETZ

Supreme Court, U. S.
FILED
AUG 5 1977
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 76-1200

ROGER CRIST, Warden of the Montana State Penitentiary, Deer Lodge, Montana, et al.,

Appellants,

v.

MERREL CLINE and L. R. BRETZ,

Appellees.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR APPELLEE MERREL CLINE

W. WILLIAM LEAPHART
THE LEAPHART LAW FIRM
1 No. Last Chance Gulch
Suite 6
Helena, Montana 59601

Court-appointed counsel for appellee Cline

Washington, D.C. • CLB PUBLISHERS' • LAW PRINTING CO. • (202) 393-0625

TABLE OF CONTENTS

	Page
JURISDICTION	1
QUESTIONS PRESENTED	2
HISTORICAL PERSPECTIVE	6
SUMMARY OF ARGUMENT	7
ARGUMENT	8
THE MONTANA COURTS HAVE MISINTERPRETED THE JURY TRIAL DECISIONS	9
APPLICATION OF THE BILL OF RIGHTS TO THE STATES MUST BE GOVERNED BY CONSTITUTIONAL STANDARDS	11
THE POINT IN TIME AT WHICH JEOPARDY ATTACHES IS A STANDARD OF CONSTITUTIONAL DIMENSIONS	13
THE MONTANA RULE UNDERMINES CONSTITUTIONAL POLICIES AND WORKS TO THE PREJUDICE OF THE DEFENDANT	16
THE FEDERAL COURTS, WITHOUT EXCEPTION, HAVE IMPOSED THE SERFASS STANDARD UPON THE VARIOUS STATES	19
CONCLUSION	23

TABLE OF AUTHORITIES

Apodaca v. Oregon, 406 U.S. 404 (1972)	9,10,11
Bartkus v. Illinois, 359 U.S. 121 (1959)	6
Benton v. Maryland, 395 U.S. 784 (1969)	7,8,11,18,19,23
Breed v. Jones, 421 U.S. 519 (1975)	19,20,23
Cline v. Crist, 546 F.2d 1336 (9th Cir. 1976)	6
Cline v. Montana, 394 F. Supp. 803 (Mont. 1975)	4
Cline v. Montana, 406 F. Supp. 430 (Mont. 1975)	6,19
Dimick v. Schiedt, 293 U.S. 474 (1934)	15
Downum v. United States, 372 U.S. 734 (1963)	7,13,17,21,23
Gori v. United States, 367 U.S. 364 (1961)	17

	Page
Green v. United States, 355 U.S. 184 (1957)	7,14,15,18,22
Illinois v. Somerville, 410 U.S. 458 (1973)	7,13
Johnson v. Louisiana, 406 U.S. 356 (1972)	10
Ker v. California, 374 U.S. 23 (1963)	7,12
Malloy v. Hogan, 378 U.S. 1 (1964)	7,12
Palko v. Connecticut, 302 U.S. 319 (1937)	8,9,18
Pointer v. Texas, 380 U.S. 400 (1964)	7,12
Serfass v. United States, 420 U.S. 377 (1974)	13,14,18,20
Smith v. Mississippi, 478 F.2d 88 (5th Cir.) *cert. den.* 414 U.S. 1113 (1973)	21,22
State v. Cunningham, 535 P.2d 186 (Mont. 1975)	5
Thomas v. Beasley, 491 F.2d 507 (6th Cir. 1974)	21
United States ex rel. Webb v. Court of Common Pleas, 516 F.2d 1034 (3rd Cir. 1975)	21
United States ex rel. Somerville v. Illinois, 447 F.2d 733 (7th Cir. 1971)	21
United States v. Jenkins, 490 F.2d 868 (2nd Cir. 1973)	6
United States v. Jorn, 400 U.S. 470 (1970)	*passim*
United States ex rel. Rogers v. LaVallee, 517 F.2d 1330 (2nd Cir.) *cert. den.* 423 U.S. 1078 (1976)	21
United States v. Martin Linen Supply Co., 51 L.Ed.2d #4 P.642 (1977)	13,19
Whitfield v. Warden of Maryland, 486 F.2d 1118 (4th Cir. 1973)	21
Williams v. Florida, 399 U.S. 78 (1970)	9,10,11
Winsor v. The Queen, L.R. 1 Q.B. 289 (1866)	7
Statutes Cited:	
Revised Codes of Montana, 1947, §95-1711	1
Rule 23 (b) Federal Rules of Criminal Procedure	9
28 U.S.C., §1254	1
Treatises:	
Blackstone's Commentaries	6
Shulhofer, Jeopardy and Mistrials, Univ. of Pa. L. Rev. Vol. 125 No. 3 (1977)	6,7

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 76-1200

ROGER CRIST, as Warden of the Montana State Penitentiary, Deer Lodge, Montana, et al.,

Appellants,

v.

MERREL CLINE and L. R. BRETZ,

Appellees.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR APPELLEE MERREL CLINE

JURISDICTION

The Court has postponed the question of jurisdiction to the hearing on the merits. Appellee Cline has filed a motion to dismiss the appeal. This motion is still pending.

Appellants pose three questions on appeal. The first two of these questions concern the constitutionality of R.C.M., 1947, §95-1711. It is Appellee's position that the questions on which this decision depends are so unsubstantial as not to need further argument. This contention is based on the fact that the federal courts, including the Supreme Court, have, without exception, applied the rule that jeopardy attach upon the swearing of the jury

to the state courts. This issue is discussed fully in the following brief.

Appellant's third issue raises the question of "manifest necessity". The issue of "manifest necessity" does not come within the jurisdiction of this Court under 28 U.S.C. 1254 (2), since the issue does not involve the constitutionality of a state statute. Further, Appellants have specifically admitted that the Court lacks jurisdiction over the issue of "manifest necessity". See Appellant's brief, p. 14.

QUESTIONS PRESENTED

On page 3 of their Brief, the appellants pose the question, "Can Montana determine by statute that jeopardy attaches in a trial when the first witness is sworn, or must it conform to the Federal Procedural Rules which establish the swearing of the jury as the point at which jeopardy attaches?"

Appellee Cline takes exception to the question as posed by the appellants. Contrary to the tenor of the question as stated, the attachment of jeopardy rule is not part of the Federal Rules of Criminal Procedure. Rather, it is a product of United States Supreme Court case law, as will be discussed in this brief. Correctly stated, the question should read, "Whether the attachment of jeopardy rule is a product of Constitutional exegesis or rather an exercise of the Supreme Court's supervisory power over Federal Courts and officials?"

Secondly, on page 12, the Appellants' Brief asserts that the states are free to adopt "rules that cause jeopardy to attach even earlier [than the Federal rule]. . . ."

This assertion misstates the issue before the Court. The Court is concerned with a Montana statute which provides that jeopardy attach upon the swearing of the first witness; this is a point in time *after* the swearing of the jury which is the rule in the Federal Courts as required by the Supreme Court.

STATEMENT OF THE CASE

This is an appeal by the State of Montana from the Ninth Circuit Court of Appeals' reversal of a denial of Appellees' petition for a Writ of Habeas Corpus. The facts and proceedings which lead to this appeal are as follows:

1. On October 31, 1974, Appellees Cline and Bretz were charged in a nine-count Information in Clause No. 3921 in the State District Court of Lewis and Clark County, Montana. Appellee Cline's wife, Shirley, was also charged in Count Nine of the same Information.

2. On March 10, 1975, the parties commenced a *voir dire* examination of the jury panel.

3. On March 11, 1975, Count Nine was dismissed on motion of the State, thus removing Shirley Cline as a defendant in the prosecution.

4. On March 13, 1975, a jury was impaneled and sworn and then excused; no witnesses were sworn. Defense counsel then moved for an order restricting the State's evidence to the allegations in the Information, *i.e.*, various counts of the Information alleged acts occurring in 1974, and yet charged the defendants with violating statutes which were repealed as of December 31, 1973.

5. On March 24, 1975, the trial judge, on his own motion, dismissed Counts II, VII, and VIII (Appendix pages 3-9) of the Information for "the reason that said Counts are fatally defective on their face; they allege crimes committed after January 1, 1974, under statutes that expired on that day; they therefore fail to charge an offense."

6. On March 24, 1975, counsel for the State of Montana requested a continuance so that the State could petition the Supreme Court of Montana for a Writ of Supervisory Control in regards to the dismissal of the three Counts.

7. On March 28, 1975, counsel for Appellee and for the State presented oral argument to the Montana Supreme Court requesting an adversary hearing on the issuance of a Writ of

Supervisory Control. The Montana Supreme Court scheduled an adversary hearing for April 2, 1975.

8. On April 2, 1975, the Montana Supreme Court refused to further entertain the matter when defense counsel insisted upon having a public hearing in lieu of an *in camera* hearing. The Montana Supreme Court ordered the parties to return to the District Court and to proceed to trial.

9. On April 4, 1975, the State of Montana moved to dismiss the remaining five counts on the Information for the exclusive purpose of filing a new and different Information against the Appellees. Defense counsel objected, refusing to join the State's motion and reserving all rights in the event of a dismissal. The trial court granted the dismissal.

10. On April 4, 1975, a new Information (No. 3963) (Appendix 12-15) was filed charging Appellees Cline and Bretz, along with Appellee's wife, Shirley Cline, each with the commission of two felonies; Grand Larceny and Obtaining Money by False Pretenses. Both of these counts had been charged in the original Information.

11. On April 25, 1975, Appellee filed a motion to dismiss the prosecution on the grounds that he was twice in jeopardy in violation of the Fifth Amendment to the United States Constitution.

12. On May 1, 1975, the Trial Judge denied the Appellee's double jeopardy motion.

13. On May 21, 1975, Appellee requested the Federal District Court to convene a three-judge court to enjoin the state prosecution and to declare R.C.M., 1947, §95-1711(3)(d) unconstitutional. Appellee argued: that unless a double jeopardy determination is made prior to a second trial, the Fifth Amendment loses its substance; a second trial constitutes an irretrievable denial of the Fifth Amendment guarantee against being twice put in jeopardy.

14. On June 6, 1975, the United States District Court denied the application for the convening of a three-judge court. *Cline v. Montana*, 394 F. Supp. 803 (1975).

15. On June 9, 1975, Appellee appealed the District Court denial of a three-judge court to the Circuit Court of Appeals for the Ninth Circuit.

16. On June 10, 1975, the United States District Judge refused to order a stay pending the appeal to the Circuit Court.

17. On June 12, 1975, counsel for Appellees Cline and Bretz submitted a petition to the Ninth Circuit for a stay of the prosecution pending the appeal of the application for a three-judge court.

18. On June 13, 1975, a two-judge panel of the Ninth Circuit Court of Appeals denied Appellees' motion for a stay pending appeal.

19. On June 13, 1975, counsel for Appellees Cline and Bretz applied to the United States Supreme Court for a stay pending appeal to the Ninth Circuit Court of Appeals.

20. On June 14, 1975, the United States Supreme Court (Justice Brennan) denied the application for a stay pending appeal.

21. On June 16, 1975, trial commenced and on July 2, 1975, Appellees Cline and Bretz, along with Appellee Cline's wife, Shirley, were found guilty of Obtaining Money by False Pretenses.

22. On July 17, 1975, Appellees petitioned the Supreme Court of Montana for a Writ of Habeas Corpus on the grounds they were convicted in violation of the Fifth Amendment Guarantee against being put twice in jeopardy.

23. On July 23, 1975, the Montana Supreme Court denied the application for a Writ of Habeas Corpus relying on its decision in *State v. Cunningham*, 535 P.2d 186 (1975). (App. 21-28). In *Cunningham*, the Montana Supreme Court held that the United States Supreme Court rulings that jeopardy attaches when a jury is impaneled and sworn are not binding on the State, and that R.C.M., 1947, §95-1711(3)(d), is constitutional.

24. On October 18, 1975, Appellees applied to the Federal District Court for a Writ of Habeas Corpus on the grounds that the second prosecution was in violation of the Fifth Amendment Double Jeopardy Clause.

25. On December 31, 1975, the United States District Court denied the application for a Writ of Habeas Corpus. *Cline & Bretz v. Montana,* 406 F. Supp. 430 (1975) (Jur.St. p.42).

26. Appellee Cline then appealed to the Ninth Circuit Court of Appeals. The Circuit Court reversed the judgment of the Federal District Court in 546 F.2d 1336 (9th Cir. 1976) (Jur.St. p. 13).

27. The State of Montana then appealed to the United States Supreme Court on December 13, 1976.

28. In the State court appeal, the Montana Supreme Court reversed the conviction of Appellee Cline and affirmed the conviction of Bretz. 555 P.2d 724 (Mont. 1976).

HISTORICAL PERSPECTIVE

The Fifth Amendment Double Jeopardy Clause embodies "one of the oldest ideas found in Western Civilization." *Bartkus v. Illinois,* 359 U.S. 121, 151 (1959) (Black, J., dissenting). The concept of Double Jeopardy dates back to early Greek, Roman and Canon law. *United States v. Jenkins,* 490 F.2d 868, 879-81 (2nd Cir. 1973) (Friendly, J.), affirmed, 420 U.S. 358 (1975).

Blackstone stated that it is a "universal maxim of the common law of England, that no man is to be brought into jeopardy of his life, more than once for the same offense." 4 W. Blackstone, Commentaries 335. Professor Shulhofer points out that the common law plea of former jeopardy was unavailable when proceedings were terminated prior to judgment because jeopardy was not deemed to "attach" until the verdict was rendered and duly recorded. Schulhofer, *Jeopardy and Mistrials,* Univ. of Pa. L. R., Vol. 125, No. 3, p. 453, Jan. 1977. Further, a judge, before recording a verdict, could ask the jury to reconsider its verdict. As long as only one verdict was recorded, a verdict of acquittal could be changed to one of conviction without imposing double jeopardy. *See,* 4 W. Blackstone, Commentaries, 335-38.

American jurisdictions have greatly expanded the scope of the common law doctrine of Double Jeopardy. Fifth Amendment Double Jeopardy has been held to apply to both capital and non-

capital crimes despite the "life or limb" wording of the Amendment. *See, e.g., Green v. United States,* 355 U.S. 184 (1957) (Black, J.). Under the common law, jeopardy did not attach until a verdict was rendered. American courts have expanded the protection of the doctrine by requiring that jeopardy attach upon the swearing of the jury. *Downum v. United States,* 372 U.S. 734 (1963). This rule is rooted in the common law doctrine that, once the jury is sworn, the case is committed to the jurisdiction of the Court and the judge may not dismiss the jury except in cases of "evident necessity." 4 W. Blackstone, Commentaries 360. The common law defendant, however, could not prevail on a plea of former jeopardy after an improper discharge of the jury by the trial judge. *Winsor v. The Queen,* L.R. 1 Q.B. 289 (1866).

The question presented by this appeal is whether or not the rule that jeopardy attaches upon the swearing of the jury is constitutionally mandated?

SUMMARY OF ARGUMENT

When a particular guarantee of the Bill of Rights is incorporated in the Due Process Clause of the Fourteenth Amendment, the same constitutional standards must be applied by both the Federal and State Courts. *Malloy v. Hogan,* 378 U.S. 1, 11 (1964); *Ker v. California,* 374 U.S. 23, 33 (1963); *Pointer v. Texas,* 380 U.S. 400, 406 (1964). The Double Jeopardy Clause of the Fifth Amendment has been applied to the states through the Due Process Clause of the Fourteenth Amendment. *Benton v. Maryland,* 395 U.S. 784, 795 (1969). In interpreting the Double Jeopardy Clause, the U. S. Supreme Court has held that jeopardy attaches upon the impaneling and swearing of the jury. *Downum v. United States,* 372 U.S. 734 (1963); *United States v. Jorn,* 400 U.S. 470 (1970); *Illinois v. Somerville,* 410 U.S. 458 (1973).

Appellee submits that the above authorities require the conclusion that the attachment of jeopardy rule is constitutionally mandated, and thus, no different rule may be adopted by the State Courts.

ARGUMENT

Prior to its decision in *Benton v. Maryland*, 395 U.S. 784 (1969), the Supreme Court employed the "fundamental fairness" doctrine to test the constitutionality of prosecutions by State and Federal authorities under the Double Jeopardy Clause of the Fifth Amendment. *Palko v. Connecticut*, 302 U.S. 319 (1937).

In *Palko*, rather than look to the specific guarantees of the Bill of Rights, the Court ascertained whether "due process" has been satisfied. Under *Palko*, the states were free to differ from the Federal standards governing application of the Fifth Amendment, so long as the totality of the circumstances did not disclose a denial of fundamental fairness. Only when a kind of double jeopardy subjected a defendant to ". . . a hardship so acute and shocking that our polity will not endure it," did the Fourteenth Amendment prohibit reprosecution. *Palko, supra*, at 328.

In *Benton v. Maryland, supra*, the Court rejected the *Palko* "fundamental fairness" doctrine and held that state as well as federal Courts are bound by constitutional standards under the Bill of Rights.

> "*Palko* represented an approach to basic constitutional rights which this Court's recent decisions rejected. It was cut of the same cloth as *Betts vs. Brady*, 316 U.S. 455 (1942), the case which held that a criminal defendant's rights to counsel was to be determined by deciding in each case whether the denial of that right was "shocking to the universal sense of justice." *id.* at 462. . . . Our recent cases have thoroughly rejected the *Palko* notion that basic constitutional rights can be denied by the states so long as the totality of the circumstances does not disclose a denial of "fundamental fairness." Once it is decided that a particular Bill of Rights guarantee is fundamental to the American scheme of justice, *Duncan vs.Louisiana, supra*, at 149, the same constitutional standards apply against both the state and federal governments. *Palko's* roots had thus been cut away years ago. We today only recognize the inevitable.." *Benton, supra*, at 794-795.

Thus, in *Benton v. Maryland*, the Court found that the double jeopardy prohibition of the Fifth Amendment represents a

fundamental ideal in our constitutional heritage and applied that guarantee to the states through the Fourteenth Amendment. The validity of defendant Benton's larceny conviction was judged, not by the watered-down standard enunciated in *Palko*, but under the specific provisions and standards of the Fifth Amendment Double Jeopardy Clause.

THE MONTANA COURTS HAVE MISINTERPRETED THE JURY TRIAL DECISIONS

The State of Montana now argues that, although the Montana rule differs from the Federal rule, in substance, it still preserves the constitutional guarantee against double jeopardy. This was the holding of the Montana Supreme Court in its decision that the Federal rule has no inherent merit as opposed to the Montana rule. (App. 26-27). Likewise, the Federal District Court for the District of Montana adhered to this reasoning and relied on the fact that, although the Sixth Amendment Trial by Jury guarantee is imposed upon the states, the states are not required to have twelve-person juries nor are the states required to have unanimous juries; both of which are requirements in the Federal system.

In *Williams v. Florida*, 399 U.S. 78, (1970), and *Apodaca v. Oregon*, 406 U.S. 404 (1972), the Court ascertained what standards or substrata are necessary to impart Constitutional meaning to the Sixth Amendment guarantee to a jury trial. In *Williams*, a majority of the Court found that the twelve-person requirement is not of constitutional stature and, thus, the states are allowed in implementing the Sixth Amendment guarantee to a jury trial, to provide for less than a twelve-person jury.

The *Williams* decision is not authority for the proposition that the states may ignore constitutional standards as to when jeopardy attaches and instead adopt their own standards in that regard.

The requirement of a twelve-person jury in Federal Court is contained in Rule 23(b) of the Federal Rules of Criminal

Procedure. The requirement as to the attaching of jeopardy, on the other hand, is not a federal procedural rule, but rather is a standard pronounced by the Supreme Court in interpreting a fundamental constitutional guarantee. The two requirements are not parallel. One is of constitutional stature and the other is not.

The case *sub judice* is also distinguishable from the *Apodaca* decision. In *Apodaca*, a plurality of the Court rejected the claim that a conviction of a crime by less than a unanimous jury violates the right to trial by jury in criminal cases specified by the Sixth Amendment and made applicable to the states by the Fourteenth Amendment. The Court found that the requirement of unanimity is not of constitutional stature and thus is not obligatory upon the states. Justice White, writing for the plurality, reasoned that the unanimity requirement does not further advance the purpose of the jury trial. That is, the requirement of unanimity does not materially contribute to the interposition between the accused and the accusor of the commonsense judgment of a group of laymen.

The decision in *Apodaca* is anomalous in that: "though unanimous jury decisions are not required in state trials, they are constitutionally required in federal prosecutions. How can that be possible when both decisions stem from the Sixth Amendment?" *Johnson v. Louisiana*, 406 U.S. 356, 383 (1972) (Douglas, J., dissenting).

Despite the anomalous nature of *Apodaca*, Justice Brennan admonishes:

> "In any event, the affirmance must not obscure that the majority of the Court remains of the view that as in the case of every specific of the Bill of Rights that extends to the States, the Sixth Amendment's jury trial guarantee, however it is to be construed, has identical application against both State and Federal governments." *Johnson, supra*, at 395. (Brennan, J., dissenting.)

The *Williams* majority and the Apodaca plurality have chosen to treat the twelve-person and unanimity requirements as non-constitutional rules. Neither requirement was found to be an indispensible element of the Sixth Amendment and, thus, neither requirement is obligatory on the states.

The *Williams* and *Apodaca* decisions do not alter the proposition that the Doctrine of Incorporation requires that the Bill of Rights be applied to both federal and state governments by the same "constitutional" standards.

The right to a jury trial and the protection from Double Jeopardy derive from parallel constitutional guarantees. However, the fact that the states are not bound by the twelve-person and unanimity requirements of a federal jury trial, does not mean that the states are at liberty to vary from the rule as to the attaching of jeopardy. The standards underpinning the various constitutional guarantees must be individually analysed to determine whether or not they are of constitutional stature. Unlike the unanimity and twelve-person requirement, the rule that jeopardy attaches upon the swearing of the jury is of constitutional stature and must be applied by the states.

APPLICATION OF THE BILL OF RIGHTS TO THE STATES MUST BE GOVERNED BY CONSTITUTIONAL STANDARDS

In light of *Benton v. Maryland*, the question presently before the Court is whether or not the time at which jeopardy attaches is a constitutional "standard" or, whether, it is non-constitutional consequence of the Supreme Court's supervisory power over Federal Courts which countenances different applications in state and federal courts?

The decisions of this Court clearly indicate that once a constitutional guarantee is found to be a fundamental right incorporated through the Fourteenth Amendment, the same constitutional standards apply against both state and federal governments.

Each time this Court has interpreted the Fourteenth Amendment as encompassing a particular guarantee of the Bill of Rights, the Court has, without exception, ruled that the same constitutional standards apply against both state and federal

authorities. In *Malloy v. Hogan*, 378 U.S. 1, 11 (1963), this Court held:

> "The state urges, however, that the availability of the privilege [self-incrimination] to a witness in a state inquiry is to be determined according to a less stringent standard than is applicable in a federal proceeding. We disagree. We have held that the guarantees of the First Amendment (cases), the prohibition of unreasonable searches and seizures of the Fourth Amendment, (cases), and the right to counsel guaranteed by the Sixth Amendment, (cases), are all to be enforced against the states under the Fourteenth Amendment according to the same standards that protect those personal rights against federal encroachment. In the coerced confession cases, involving the policies of the privilege itself, there has been no suggestion that a confession might be considered coerced if used in a federal but not a state tribunal. The Court thus has rejected the notion that the Fourteenth Amendment applies to the states only a "watered-down, subjective version of the individual guarantees of the Bill of Rights," (cases).' *Malloy v. Hogan, supra*, at 11.

In *Ker v. California*, 374 U.S. 23, 30 (1963), the Court held that the Fourteenth Amendment is enforceable against the states "by the application of the same constitutional standard prohibiting unreasonable searches and seizures." Likewise, in *Pointer v. Texas*, 380 U.S. 400, 406 (1964), the Court held that the Sixth Amendment confrontation clause "is to be enforced against the states under the Fourteenth Amendment according to the same standards that protect those personal rights against federal encroachment".

Appellee submits that the states have no more liberty to "water-down" the guarantees of the Fifth Amendment than they have to "water-down" the guarantees of the First, Fourth and Sixth Amendments. As with the constitutional guarantees involved in *Malloy, Ker*, and *Pointer*, it would be incongruous to have different standards determine the validity of a claim of Double Jeopardy depending on whether the claim was asserted in a state or a federal court. Since it is the same fundamental constitutional guarantee being asserted in both the federal and

state court, the same standards must determine at what point Fifth Amendment Jeopardy attaches in both federal and state proceedings.

THE POINT IN TIME AT WHICH JEOPARDY ATTACHES IS A STANDARD OF CONSTITUTIONAL DIMENSIONS

Appellants has cited no authority which would suggest that the point in time at which jeopardy attaches is not of constitutional stature. On numerous occasions, this Court has stated that, in a jury trial, jeopardy attaches upon the impaneling and swearing of the jury. *Downum v. United States*, 372 U.S. 734 (1963); *United States v. Jorn*, 400 U.S. 470 (1970); *Illinois v. Somerville*, 410 U.S. 458 (1973); *United States v. Martin Linen Supply Co.*, 51 L.Ed.2d, #4, p. 642 (1977). The rule concerning the attaching of jeopardy is not a mere "technicality", arbitrarily chosen by the Court. On the contrary, the Court has expressed sound policy reasons for having jeopardy attach when a jury is impaneled and sworn.

> "As an aid to the decision of cases in which the prohibition of the Double Jeopardy Clause has been invoked, the courts have found it useful to define a point in criminal proceedings at which the constitutional purposes and policies are implicated by resort to the concent of "attachment of jeopardy". See *United States v. Jorn, supra*, at 480. *In the case of a jury trial, jeopardy attaches when a jury is empaneled and sworn. Downum v. United States*, 372 U.S. 734 (1963); *Illinois v. Somerville*, 410 U.S. 458 (1973). In a nonjury trial, jeopardy attaches when the court begins to hear evidence. *McCarthy v. Zerbst*, 85 F.2d 640, 642 (CA10 1936). See *Wade v. Hunter*, 336 U.S. 684, 688 (1949). The Court has consistently adhered to the view that jeopardy does not attach, and the constitutional prohibition can have no application until a defendant is "put to trial before the trier of the facts, whether the trier be a jury or a judge." *United States v. Jorn, supra*, at 479. [Further citations omitted.]" *Serfass v. United States*, 420 U.S. 377, 388 (1974).

The policies alluded to in the *Serfass* decision are expressed in *Green v. U.S.*, 355 U.S. 184 (1957).

> "The constitutional prohibition against double jeopardy was designed to protect an individual from being subjected to the hazards of trial and possible conviction more than once for an alleged offense."
>
> * * *
>
> "The underlying idea, one that is deeply engrained in at least the Anglo-American system of jurisprudence, is that the state with all its resources and powers should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense, and ordeal and compelling him to live in a state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty."

The policy behind having jeopardy attach when the jury is impaneled and sworn, is expressed as follows:

> "Moreover it is not even essential that the verdict of guilt or innocence be returned for a defendant to have once been placed in jeopardy so as to bar a second trial on the same charge. This Court, as well as most others, has taken the position that a defendant is placed in jeopardy once if put on trial before a jury so that if the jury is discharged without his consent he cannot be tried again. [citations omitted]. This prevents a prosecutor or judge from subjecting a defendant to a second prosecution by discontinuing the trial when it appears that a jury might not convict." *Green, supra*, at 188.

The Court later elaborated on these policies in *U.S. v. Jorn*, 400 U.S. 470 (1970), wherein it held:

> "The Fifth Amendment's prohibition against placing a defendant twice in jeopardy represents a constitutional policy of finality for the defendant's benefit in Federal criminal proceedings. A power in government to subject the individual to repeated prosecutions for the same offense would cut deeply into the framework of procedural protections which the Constitution establishes for the conduct of a criminal trial. And society's awareness of the heavy personal strain which a criminal trial represents for

> an individual defendant is manifest in the willingness to limit the government to a single criminal proceeding to vindicate its very vital interest in enforcement of criminal laws. Both of these considerations are expressed in *Green v. U.S.* . . . [quotation from *Green* omitted]. These considerations have lead this court to conclude that a defendant is placed in jeopardy in a criminal proceeding once the defendant is put to trial before the trier of facts, whether the trier be a jury or a judge. [citations omitted].
>
> * * *
>
> "*Thus the conclusion that "jeopardy attaches" when the trial commences expresses a judgment that the constitutional policies underpinning the Fifth Amendment's guarantee are implicated at that point in a proceeding.*" *Jorn, supra*, at 479-480.

The significance the Court places on the swearing of the jury is consistent with the American scheme of justice. The jury is "the most transcendant privilege which any subject can enjoy and is justly dear to the American people." *Dimick v. Schiedt*, 293 U.S. 474, 485 (1934). It is the jury which is the finder of fact and which must ultimately determine guilt or innocence. Once a jury of peers has been impaneled and sworn to sit in judgment of a fellow citizen, the constitutional policies underpinning the double jeopardy clause are brought into play. To allow a state to dismiss the entire prosecution after the swearing of the jury is to thwart the very policies the Court has chosen to protect by having jeopardy attach at that point in time.

THE MONTANA RULE UNDERMINES CONSTITUTIONAL POLICIES AND WORKS TO THE PREJUDICE OF THE DEFENDANT

The rule that jeopardy attaches when a jury is impaneled and sworn is much less subject to prosecutorial manipulation than is the Montana rule. The time between the impaneling of the jury and the swearing of the jury is negligible whereas the time between the swearing of the jury and the swearing of the first witness is, most often, considerable. Juries are invariably sworn by the Court immediately upon being impaneled. If a prosecutor were to make a motion to dismiss the prosecution after the jury was impaneled but before it was sworn, the court would most certainly suspect prosecutorial manipulation. Normally, there is nothing that transpires after the jury has been impaneled but before it is sworn which would warrant dismissal of the entire prosecution.

The period of time between the swearing of the jury and the swearing of the first witness is an entirely different matter. Although the swearing of the first witness generally follows shortly after the swearing of the jury, there still remains a very crucial interim period during which counsel may make opening statements and either side may make motions. This period of time may take only a few hours or it may span a week-end recess, thus taking days. Regardless of the length of time involved, the fact remains, in Montana, that this is a period of time when the state may contemplate the desirability of the jury panel which has been sworn as well as hear the opening statement of the defense counsel should he choose to make one. If a prosecutor does not like what he hears in the opening statements or if he decides that the jury is defense oriented, he can dismiss the entire prosecution without justification, thus denying the defendant his valued right to have his trial completed by a particular tribunal. *United States v. Jorn*, 400 U.S. at 484. The Montana statute not only defeats the policies underpinning the Double Jeopardy Clause, but also lends itself to covert manipulation.

The Supreme Court has emphatically discouraged pre-verdict dismissals of juries.

> "Harassment of an accused by successive prosecutions or declaration of a mistrial so as to afford the prosecution a more favorable opportunity to convict are examples when jeopardy attaches. *Gori v. U.S.*, 367 U.S. 364 (1961).
>
> • • •
>
> "The discretion to discharge the jury before it has reached a verdict is to be exercised only in the very extraordinary and striking circumstances, to use the words of Mr. Justice Story in *U.S. v. Coolidge*. . . For the prohibition of the Double Jeopardy Clause is not against being twice punished but against being twice put in jeopardy." *Downum v. U.S.*, 372 U.S. 734, at 736.

Contrary to the pronouncements of the Supreme Court that discharge of a jury prior to verdict is to be exercised only in "very extraordinary and striking circumstances", *Downum, supra*, the Montana procedure allows the prosecution to dismiss a jury prior to verdict without any showing of "extraordinary circumstances" or "manifest necessity." In essence, the Montana procedure gives the prosecution an infinite number of peremptory challenges by allowing the prosecution to dismiss, arbitrarily, an entire prosecution; discharge the jury; refile an Information and pick a new jury of twelve men and women. This alone offends all concepts of fair play and due process and subjects the defendant to considerable prejudice. Most importantly, the defendant is "deprived of his valued right to have his trial completed by a particular tribunal." *U.S. v. Jorn*, 400 U.S. at 484. The Supreme Court does not look lightly upon the circumventing of this "valued right." See *Wade v. Hunter*, 336 U.S. 684, 689 (1948). Additionally, such a premature dismissal denies the defendant his right to proceed to verdict on the viable counts of the Information. Finally, the defendant is further prejudiced by the fact that he has no corresponding privilege of aborting the entire proceeding at his whim and picking a new jury more to his liking. The Montana defendant is denied the privilege afforded the prosecutor of examining the jury as a whole and the option of

challenging all twelve jurors and starting anew. The Montana Rule not only deprives defendant of his right to have his trial completed by a particular tribunal, but also, it fails to put the defendant on an equal footing with the prosecution in terms of challenging jurors.

The pronouncements by the Court in *Jorn* and *Green*, clearly indicate that the time at which jeopardy attaches is not a mere "technicality," *Serfass v. United States*, 420 U.S. 377, 391 (1974), but rather is a statement of policy designed to protect both state and federal defendants from repeated prosecutions and to prevent the prosecution from enhancing its opportunities to convict. It establishes a point in time beyond which a jury may not be dismissed without a showing of manifest necessity or extraordinary circumstances. The Montana rule, on the other hand, defeats these very policies by allowing the prosecution a considerable period of time to dismiss the jury prior to verdict without any showing of manifest necessity. Conceivably, this process could continue *ad infinitum* until the prosecution obtained a jury to its liking. Appellee submits that this is entirely contrary to the "incorporation" of the Fifth Amendment under *Benton v. Maryland, supra*, and does not even satisfy the "watered-down" fundamental fairness standard of *Palko* which has been rejected by this Court.

THE FEDERAL COURTS, WITHOUT EXCEPTION, HAVE IMPOSED THE SERFASS STANDARD UPON THE VARIOUS STATES

The point at which jeopardy attaches is a standard enunciated by the Supreme Court most recently in *United States v. Martin Linen Supply Company, supra*, and is not a rule of Federal Criminal Procedure. This standard must be applied as an element of the Fifth Amendment, "lock, stock and barrel" to the states. *Benton v. Maryland, supra*, at 801 (Harlan, J., dissenting, and characterizing the majority's approach to "incorporation").

Nothing could be more crucial to the "application" of double jeopardy than the determination at what point jeopardy attaches. This is precisely why the Federal courts, when reviewing state court proceedings, have not only determined what constitutes a "trial" for purposes of the Fifth Amendment, but also have told the states at what point jeopardy attaches.

For example, in *Breed v. Jones*, 421 U.S. 519 (1975), the Court held that the prosecution of Breed as an adult in California Superior Court, after an adjudicatory finding in juvenile court that he had violated a criminal statute and a subsequent finding that he was unfit for treatment as a juvenile, violated the Double Jeopardy Clause of the Fifth Amendment as applied to the states through the Fourteenth Amendment. In interpreting the *Breed* case, the Federal District Court for the District of Montana held:

> "Nowhere in the opinion [*Breed*] does the Court baldly assert that a state cannot determine at what point trial commences. Nor does the Court ever attempt to impose any federal procedural rule upon the California Juvenile Court. The sole concern in *Breed*, as it is in the instant case, is not whether federal procedures were followed, but whether federally guaranteed rights were violated." *Cline v. Montana*, 406 F. Supp. 430 (1975) (Jur. St. p. 42).

Appellee Cline agrees that the Supreme Court did not baldly assert that a state cannot determine at what point a trial

commences. Appellee does submit, however, that the Court went further than deciding that a juvenile proceeding constituted a "trial" within the meaning of the Fifth Amendment Double Jeopardy Clause. The Court specifically ruled as to what point in time jeopardy attached. Chief Justice Burger, speaking for a unanimous Court, stated:

> "We therefore conclude that the respondent was put in jeopardy at the adjudicatory hearing. Jeopardy attached when the respondent was "put to trial before the trier of facts," *ibid.*, that is, when the juvenile court, as the trier of the facts, began to hear evidence. See *Serfass v. United States*, 420 U.S. 388." *Breed v. Jones*, 421 U.S. 519, 531 (1974).

Although the Court did not "baldly assert" that California could not determine at what point a trial commenced, it did impose the federal standard as to when jeopardy attaches upon the California State Juvenile Court.

Although the *Breed* case involved a judge trial rather than a jury trial, the case is significant because the Court imposed the federal standard on the California Court and cited *Serfass v. United States* as authority. The *Serfass* decision states that in the case of a nonjury trial, jeopardy attaches when the court begins to hear evidence, however, "In the case of a jury trial, jeopardy attaches when a jury is empaneled and sworn." *Serfass, supra*, at 388.

Appellee Cline submits that had the *Breed* case been a jury trial, the Supreme Court likewise would have cited *Serfass* and held that jeopardy attached when a jury was impaneled and sworn. The conclusion of the District Court that the states may determine for themselves when jeopardy attaches is incorrect as is evidenced by the Supreme Court's specifically applying the federal standard to the State of California. In *Breed*, the Supreme Court effectively held that the standard enunciated in *Serfass* is of constitutional stature and that the states may not determine for themselves at what time jeopardy attaches.

Seven Circuit Courts of Appeals (including the 9th Circuit) have addressed themselves to habeas corpus petitions from state

prisoners and all seven Circuits have held that the decisions of the United States Supreme Court require that jeopardy attach when the jury is impaneled and sworn. Four of the Circuits have applied the federal rule to the states as a matter of course with no discussion of the issue. *United States ex rel. Rogers v. LaVallee*, 517 F.2d 1330, 1333 (2nd Cir. 1975); *cert. den.*, 423 U.S. 1078 (1976); *United States ex rel. Webb v. Court of Common Pleas*, 516 F.2d 1034, 1039 (3rd Cir. 1975); *Whitfield v. Warden of Maryland*, 480 F.2d 1118, 1122 (4th Cir. 1973); *Thomas v. Beasley*, 491 F.2d 507, 508 (6th Cir. 1974).

In *United States ex rel. Somerville v. Illinois*, 447 F.2d 733, 735 (7th Cir. 1971), rev'd. on other grounds, 410 U.S. 458 (1973), the Seventh Circuit was presented with an argument identical to the argument made here, and ruled that federal, not state, law "is controlling on the issues as to when jeopardy attaches." In *Smith v. Mississippi*, 478 F.2d 88, 93 (5th Cir.) *cert. den.*, 414 U.S. 1113 (1973), the Fifth Circuit addressed a double jeopardy claim of a state prisoner and concluded:

> "The [state's] contention that petitioner was not put to trail or was in no way prejudiced by the dismissal of the proceedings before testimony was presented has been decided adversely to it by the Supreme Court in *Downum* . . . and *Somerville* . . . . In both cases the Supreme Court held that jeopardy attached when the first jury was selected and sworn. The mere introduction of evidence has no spontaneous affect on the defendant which can be said to automatically charge him with an appreciable degree of insecurity once he has made the preparations for trial and selected those of his peers who will determine his fate."

Implicit in the Fifth Circuit's reliance on *Downum* and *Somerville* is the reasoning that sound policy dictates having jeopardy attach upon the swearing of the jury. The Montana Supreme Court ignored these policy considerations when it held that jeopardy does not attach until the swearing of the first witness. (App. p. 27). The Montana Court based its decision on the premise that the jury has nothing to consider prior to the swearing of the first witness. This premise is inaccurate. First of all, as pointed out earlier, the jury does have the opening

statements of counsel to consider prior to the swearing of the first witness. Secondly, the jury has nothing other than the opening statements to consider after the swearing of the witness because the witness has not yet begun to testify. Even assuming, *arguendo*, that jeopardy attaches at a point later in time [after the testimony commences], the *Smith* decision points out, "The mere introduction of evidence has no spontaneous affect on the defendant which can be said to automatically charge him with an appreciable degree of insecurity once he has made the preparations for trial and selected those of his peers who will determine his fate." *Smith, supra* at 93.

Not only does the Montana rule work to the distinct prejudice of the criminal defendant, but also, it has no supporting basis in policy or logic. It opens the door to dismissals after the jury is sworn thus depriving the defendant of his valued right to have his trial completed by a particular tribunal. *United States v. Jorn*, 400 U.S. at 484-485. It undermines the defendant's right to be free from financial, physical and psychological intervention worked by repetitive prosecutions. *Green v. United States*, 355 U.S. 184, 187-88 (1957). Also, as pointed out previously, the Montana rule in effect allows the prosecution an infinite number of peremptory challenges to the jury.

CONCLUSION

Appellee Cline submits that the decisions of this Court in *Downum v. United States*, 372 U.S. at 735-36, (that jeopardy attaches when a jury is impaneled and sworn), and *Benton v. Maryland*, 395 U.S. at 795 ("the same constitutional [double jeopardy] standards apply against both the state and federal governments"), and *Breed v. Jones*, 421 U.S. 519 (applying the attachment of jeopardy rule to the State of California), mandate that the Ninth Circuit Court of Appeals be affirmed in its ruling that the attachment of jeopardy rule is of constitutional stature and thus must be followed by the state courts.

THE LEAPHART LAW FIRM
Attorneys for Appellee Cline

/s/ W. William Leaphart
By: W. William Leaphart
1 No. Last Chance Gulch, #6
Helena, Montana 59601

FOR ARGUMENT.

Supreme Court, U. S.
FILED
OCT 5 1977
MICHAEL RODAK, JR., CLERK

In The

Supreme Court of the United States

No. 76-1200

ROGER CRIST, as Warden of the Montana State Penitentiary, Deer Lodge, Montana, et al.,

Appellants,

vs.

MERREL CLINE and L. R. BRETZ,

Appellees.

REPLY BRIEF FOR THE APPELLANTS

MICHAEL T. GREELY
Attorney General
State of Montana
State Capitol
Helena, Montana 59601

By ROBERT S. KELLER
Special Assistant Attorney General

Attorneys for the Appellants

COCKLE PRINTING CO., 1822 St. Mary's Ave., Omaha

TABLE OF CONTENTS

	Pages
Argument	1
Conclusion	5

TABLE OF AUTHORITIES

CASES:

Adney v. United States, — U. S. —, 52 L. Ed. 2d 651, 97 S. Ct. — (1977)	2
Breed v. Jones, 421 U. S. 519, 531 (1974)	3
Downum v. United States, 372 U. S. 734, 736 (1963)	2
Serfass v. United States, 420 U. S. 377, 388 (1974)	2, 3, 4
State v. Cunningham, 535 P. 2d 186 (Mont., 1975)	4

CONSTITUTION:

Fifth Amendment, U. S. Constitution	2, 3

In The

Supreme Court of the United States

No. 76-1200

ROGER CRIST, as Warden of the Montana State Penitentiary, Deer Lodge, Montana, et al.,

Appellants,

vs.

MERREL CLINE and L. R. BRETZ,

Appellees.

REPLY BRIEF FOR THE APPELLANTS

ARGUMENT

Appellee Bretz, other than raising a question relative to jurisdiction, adopts the brief of Appellee Cline with respect to the constitutionality of the Montana statute that holds that jeopardy does not attach until after the first witness is sworn. Appellee Bretz adds little to the argument of Appellee Cline on that point, and then devotes the bulk of his brief to the issue of manifest necessity. The state has not addressed the issue of manifest necessity.

Jurisdiction was addressed by the Appellant at the outset in the Appellant's brief, in a concise statement, as required by the rules of this court. The Ninth Circuit has held, in effect, that the Montana statute that jeopardy does not attach until after the first witness is sworn is unconsitutional, and this holding has been addressed directly by the Appellant and both Appellees.

Appellant urged that under the common law, jeopardy did not attach until a verdict was rendered. Appellees agree (brief of Appellee Cline, Page 7). I. e., at the time of the Constitution of the United States, jeopardy did not attach until then.

There is little question but that this was the law at the time of the constitution. Nor is there much question but that this concept has been changed, by the courts and state legislatures, in various jurisdictions, federal and state, throughout the United States.

The concept of not being twice put in jeopardy, or twice tried, *Downum v. United States*, 372 U. S. 734, 736 (1963); *Adney v. United States*, — U. S. —, 52 L. Ed. 2d 651, 97 S. Ct. — (1977), is not only uniformly accepted, but is now a part of the protection under the Fifth Amendment, *Serfass v. United States*, 420 U. S. 377, 388 (1974). And the rationale is not lacking.

But determining the exact moment that a person is twice-tried, the moment jeopardy attaches, is not that clear, and there is no rationale in any of the decisions of this court holding that jeopardy attaches when the jury is sworn.

This was the thrust of Appellant's brief, and totally ignored by Appellees.

A reading of the cases makes it clear that all have agreed that jeopardy attaches when the defendant is put to trial before the trier of the facts, that is, when the trier of the facts began to hear evidence. See *Breed v. Jones*, 421 U. S. 519, 531 (1974).

Appellees take the position that if *Breed* would have been a jury case, jeopardy would attach when the jury was impaneled and sworn, i. e., *before* the trier of the facts began to hear evidence. They may well be right, but not by reason of any stated rationale.

Both sides have cited *Serfass* as authority for their respective positions; the Respondents, because *Serfass* reiterates the rule in federal court that jeopardy attaches, in a jury case, when the jury is impaneled and sworn; the Appellants, because *Serfass* held "As an aid to the decision of cases in which the prohibition of the Double Jeopardy Clause has been invoked, the courts have found it useful to define a point in criminal proceedings at which the constitutional purposes and policies are implicated by resort to the concept of 'attachment of jeopardy' ", i. e., the rule has been an "aid" in determining when jeopardy attaches. *Serfass* went on to say that the constitutional prohibition has no application until a defendant is put to trial before the trier of the facts. The Model Penal Code, and the states that have adopted it (e. g., Montana, Kentucky, Arizona) read this to mean that the trier of the facts has to hear something before jeopardy attaches, as in a federal non-jury case.

In truth and fact, no jury or judge could rebut the defendant's presumption of innocence until something had been heard, so no jeopardy could attach until then. But

that would make the determination vary in every case. Accordingly, the Model Penal Code adopts an earlier point in time than when jeopardy actually attaches, the time at which the first witness is sworn (even before he testifies), the same as a federal non-jury case, and goes on to state that there is no difference in a jury and non-jury case for the application of the rule. And there really isn't.

This doesn't mean that the federal courts, congress, the states, cannot adopt an even earlier point in time, but the constitutional prohibition does not come into play until jeopardy actually attaches . . . and that is how the Appellants read *Serfass.*

Any other argyments relative to trial preparation, etc., are equally true under either rule, i. e., defendant and his counsel put in the same preparatory work up until the moment before the jury is sworn as they do up until after the first witness is sworn (Appellee Bretz expressed this very well on Page 14 of his brief).

And, the concern of Appellee about prosecutorial manipulation has been well met by Justice Haswell in *State v. Cunningham,* 535 P. 2d 186 (Mont., 1975) (App. 21-28, at p. 26).

CONCLUSION

In conclusion, we would ask that the Ninth Circuit Court of Appeals' decision be reversed, and that the Montana statute, holding that jeopardy attaches in a jury trial at the time when the first witness is sworn be held constitutional.

Respectfully submitted this 4 day of October, 1977.

MICHAEL T. GREELY
Attorney General of Montana

By ROBERT S. KELLER
Special Assistant Attorney General

Attorneys for the Appellants

Supreme Court, U. S.
JUL 26 1977
MICHAEL RODAK, JR., CLERK

No. 76-1200

In the Supreme Court of the United States

OCTOBER TERM, 1977

ROGER CRIST, ET AL., APPELLANTS

v.

MERREL CLINE AND L. R. BRETZ

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES AS AMICUS CURIAE

WADE H. MCCREE, JR.,
Solicitor General,

BENJAMIN R. CIVILETTI,
Assistant Attorney General,

FRANK H. EASTERBROOK,
Assistant to the Solicitor General,
Department of Justice,
Washington, D.C. 20530.

INDEX

Page

Interest of the United States 1

Statement 2

Discussion 6

Conclusion 20

CITATIONS

Cases:

Ashe v. *Swenson*, 397 U.S. 436 19

Brown v. *Allen*, 344 U.S. 443 8

Brown v. *Ohio*, No. 75-6933, decided June 16, 1977 19

Downum v. *United States*, 372 U.S. 734 6

Francisco v. *Gathright*, 419 U.S. 59 8

Gori v. *United States*, 367 U.S. 364 13

Himmelfarb v. *United States*, 175 F. 2d 924, certiorari denied, 338 U.S. 860 18

Illinois v. *Somerville*, 410 U.S. 458 ..... 5, 11, 17

I.T.S. Rubber Co. v. *Essex Rubber Co.*, 272 U.S. 429 8

Jeffers v. *United States*, No. 75-1805, decided June 16, 1977 ..... 12, 19

Lee v. *United States*, No. 76-5187, decided June 13, 1977 ..... 9, 10, 11, 13, 16, 17

Morales v. *New York*, 396 U.S. 102 9

Philbrook v. *Glodgett*, 421 U.S. 707 8

Picard v. *Connor*, 404 U.S. 270 8

Roberts v. *LaVallee*, 389 U.S. 40 8

Page

Cases—Continued

Roberts v. *United States*, 477 F. 2d 544 17

Scott v. *United States*, 202 F. 2d 354 18

Serfass v. *United States*, 420 U.S. 377 ..... 6, 14

State v. *Cunningham*, 535 P. 2d 186 ..... 4, 5, 7-8

United States v. *Dinitz*, 424 U.S. 600 ..... 16, 17, 18

United States v. *Gentile*, 525 F. 2d 252, certiorari denied, 425 U.S. 903 16

United States v. *Gordy*, 526 F. 2d 631 17

United States v. *Grasso*, 552 F. 2d 46, petition for a writ of certiorari pending, No. 76-1543 13

United States v. *Kehoe*, 516 F. 2d 78, certiorari denied, 424 U.S. 909 14

United States v. *Pappas*, 445 F. 2d 1194 18

United States v. *Phillips*, 431 F. 2d 949 17

Wainwright v. *Sykes*, No. 75-1578, decided June 23, 1977 14

Weinstein v. *Bradford*, 423 U.S. 147 20

Constitution and statutes:

United States Constitution:

Fifth Amendment:

Double Jeopardy Clause 1, 2, 4, 6, 7, 10, 13, 14, 19

Due Process Clause 7

Rev. Codes of Montana:

§ 94-1-103(3) (Supp. 1974) 3

§ 95-1505(b)(1969 Repl.) 11

§ 95-1702 (1969 Repl.) 14

Miscellaneous:

Note, *Double Jeopardy and Government Appeals in Criminal Cases*, 12 Colum. J.L. & Soc. Probs. 295 (1976) 14-15

Schulhofer, *Jeopardy and Mistrials*, 125 U. Pa. L. Rev. 449 (1977) 7, 16

In the Supreme Court of the United States

OCTOBER TERM, 1977

No. 76-1200

ROGER CRIST, ET AL., APPELLANTS

v.

MERREL CLINE AND L. R. BRETZ

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES AS AMICUS CURIAE

INTEREST OF THE UNITED STATES

This case presents two types of issues. We do not address the first—the time at which jeopardy attaches—because this Court's decision is not likely to affect the interests of the United States. If this Court holds that jeopardy attached in the state prosecution of appellees when the jury was sworn, the case then presents questions concerning the propriety of appellees' retrial following the dismissal of the first information. These raise a variety of legal issues important to the administration of the Double Jeopardy Clause: (1) whether a defendant may delay raising objections to the institution of the proceedings against him until jeopardy has attached, although the objections or arguments could have been made prior to trial, and still invoke double jeopardy as a bar to further prosecution when his motions lead to a premature termination of the first trial; (2) whether a defendant who has objected to a course of action that would prevent the termination of the first trial may then claim that the termination was not "manifestly

necessary" because the court could have pursued the course to which he objected; (3) whether a defendant who has an opportunity to do so must object to a pre-verdict termination of his trial in order to preserve a subsequent claim that the termination and ensuing retrial deprived him of his "valued right" to proceed to verdict before the first tribunal; and (4) whether the stage at which the first trial is terminated is material to the inquiry into the permissibility of a second trial under the Double Jeopardy Clause.

These questions, although central to the proper resolution of this aspect of the case, are very much lurking in the background, having received no consideration in the opinion of the court of appeals or in appellants' brief to this Court. Moreover, the record in this case appears to be inadequate to permit consideration of several of the issues. Because the questions presented by this facet of the case are likely to arise with some frequency in federal prosecutions, we believe it is important briefly to state our views.

STATEMENT

An information filed on October 31, 1974, charged appellees with nine Montana offenses growing out of transactions with the Industrial Accident Board of the State of Montana. Each count of the information charged a separate aspect of fraud or larceny; the preamble recited that these offenses took place between January 13, 1973, and February 19, 1974 (A. 1-11).

Jury selection began on March 10, 1975. On March 11, 1975, while the jurors were being selected, the prosecutor discovered that Count IX of the information might be defective in light of the recent revision of the criminal laws of Montana (II R. 20).[1] A complete revision of Montana

[1] "R." refers to the record in the court of appeals.

criminal laws became effective on January 1, 1974, and it applies only to offenses committed after that date; the old criminal laws continued to apply to prior offenses (Rev. Codes of Montana § 94-1-103(3) (Supp. 1974)). Since the criminal activity with which appellees were charged spanned the effective dates of the old and new statutes, it was particularly important that the charge be drawn with precision.

After the prosecutor recognized the potential defect in Count IX he communicated the problem to defense counsel and, in his words, "discovered that counsel for all * * * defendants had been aware of this issue prior to answering ready for trial and the commencement of jury selection, and had wilfully * * * withheld raising said issue planning to raise it at a point in the proceedings when jeopardy would be a bar to further prosecution" (II R. 20-21). The jury had not been sworn, however, and the prosecutor's motion to dismiss Count IX was granted on March 12, 1975.

The jury was sworn on March 13 (II R. 19). The defendants then filed a number of motions designed to preclude prosecution on several of the remaining counts. One of these motions, addressed to Count II, pointed out that the count charged an offense commencing on January 13, *1974*, and so could not be prosecuted under the old criminal statutes (see A. 3). The defendants asked the trial court "to restrict the state's evidence to the allegations of the information" (J.S. App. 16); this would, in practical effect, have prevented proof of the offense intended to be charged in Count II.

The trial court sent the jurors home and called for briefing on the many motions (II R. 21). The prosecutor filed the requested brief and also asked the trial court to permit the amendment of Count II to state that the offense commenced in 1973 rather than 1974. The court denied this

request (II R. 22). In response to the appellees' motions, however, which drew drafting defects to light, the state court *sua sponte* dismissed Counts II, VII, and VIII of the information (*ibid.*).

The prosecutor sought a writ of supervisory control from the Supreme Court of Montana, seeking to require the trial court to permit the amendment and to proceed with the trial. Because the jury was not sequestered, the prosecutor sought to hold these proceedings under seal, and the defendants objected. On April 2, 1975, the Supreme Court of Montana declined to accept the case (II R. 23; J.S. App. 17).

The prosecutor then moved to dismiss the remaining counts of the information in order to permit the State to refile a technically sufficient charge. The trial court granted this motion on April 4, 1975 (II R. 26), and a new information, dated April 4, was filed on April 7 (A. 12-15). The jury that had been sworn on March 13 was dismissed.

Appellees moved to dismiss the new charge on double jeopardy grounds. The trial court denied this motion and several others without opinion on May 1, 1975, and set the trial for June 16 (II R. 32). Appellees were tried and convicted (J.S. App. 17).

Immediately after being sentenced, appellees filed an original petition in the Supreme Court of Montana for a writ of *habeas corpus*, contending once more that their trial violated the Double Jeopardy Clause. However, the Supreme Court of Montana had, in the meantime, decided in *State* v. *Cunningham*, 535 P. 2d 186, that jeopardy did not "attach" under state law until the first evidence was received at trial and that this rule for the attachment of jeopardy was consistent with the Double Jeopardy Clause of the Fifth Amendment. Under the *Cunningham* rule, jeopardy had not "attached" when the information was

dismissed in the present case; although the jury had been sworn, no evidence had been received.

The Supreme Court of Montana accordingly denied appellees' application for *habeas corpus* (539 P. 2d 1191; II R. 42-45). It discussed the double jeopardy issue only briefly and stated that it was rejecting appellees' application for four reasons (II R. 42): (1) their legal position was foreclosed by *Cunningham*; (2) *Cunningham* had not been disapproved by the Supreme Court of the United States; (3) no transcript of trial had been prepared, and there was nothing to distinguish the present case from *Cunningham*; and (4) the double jeopardy issue could be raised on appeal in the ordinary course.

After being denied *habeas corpus* relief by the Supreme Court of Montana, appellees filed a petition for *habeas corpus* in the United States District Court for the District of Montana.[2] The district court, agreeing with *Cunningham*, declined to issue the writ (406 F. Supp. 430; J.S. App. 42-53). The district court also held that, even if jeopardy had attached at the time the information was dismissed, there was manifest necessity for the dismissal, and consequently a second trial was permissible (J.S. App. 51-53). The court relied on *Illinois* v. *Somerville*, 410 U.S. 458; it concluded that the typographical error in the information made prosecution impossible and therefore justified the termination of the first trial.

---

[2]Appellees simultaneously pursued an appeal in state court. On October 14, 1976, the Supreme Court of Montana reversed the convictions of appellee Cline and affirmed the convictions of appellee Bretz (*State* v. *Cline*, 555 P. 2d 724). The Court rejected the double jeopardy argument (*id.* at 735), but it concluded that the evidence was insufficient to convict Cline, and it accordingly ordered the charges against him dismissed. Appellee Cline therefore has received in state court all of the relief that the writ of *habeas corpus* could provide, and the federal case is moot with respect to him.

The court of appeals reversed (546 F. 2d 1336; J.S. App. 13-41). It first concluded (J.S. App. 18-32) that the time for the attachment of jeopardy was a federal constitutional question and that attachment could not be postponed by state law. It then held that the dismissal of the information after the first jury had been impaneled was not justified by manifest necessity. The dismissal of Count II was improper, the court held, because that count could have been amended (J.S. App. 36-40); the dismissal of the remaining counts was improper because they were not defective (*id.* at 35-36). Because of these considerations, the court concluded, there was not manifest necessity to terminate the first proceedings, and the second trial was barred by the Double Jeopardy Clause.

DISCUSSION

1. Appellants contend (Br. 6-13) that States may vary the time at which jeopardy "attaches" and that the Montana statute declaring that jeopardy does not attach in a jury trial until evidence is introduced is consistent with the Double Jeopardy Clause of the Fifth Amendment. If the Court should agree with this argument, it would be unnecessary to decide whether it was proper to dismiss the first information; appellees never would have been in jeopardy, and "an accused must suffer jeopardy before he can suffer double jeopardy." *Serfass* v. *United States*, 420 U.S. 377, 393.

We take no position with respect to this contention. In the federal courts jeopardy attaches when the jury is sworn.[3] We do not seek to alter this rule, because defendants may have important interests in the process of

[3]See, *e.g.*, *Serfass* v. *United States*, *supra*, 420 U.S. at 388; *Downum* v. *United States*, 372 U.S. 734.

jury selection itself that are deserving of the constitutional double jeopardy protection.[4]

2. Appellants also present (J.S. 5; Br. 3) the question whether appellees' conviction was proper even if jeopardy attached when the first jury was sworn. They do not argue the question in their brief, however. We believe that the question, which was decided by the court of appeals, is important and is squarely presented by this case. Appellees exhausted their remedies within the Montana courts; their position was doomed unless the Supreme Court of Montana reconsidered *State* v. *Cunningham*,

[4]The process of jury selection may be lengthy and difficult in some cases, or the defendant may have succeeded in obtaining a jury that he believes would be favorable to him. These interests deserve some protection, at least to the extent that there is danger in a particular case of prejudice to the accused from the dismissal of the jury. A rule postponing the attachment of jeopardy would give these interests no constitutional double jeopardy protection, although, on the other hand, abuses might still be prevented by operation of the Due Process Clause or, on a non-constitutional level, simply by the power of the trial court in its sound discretion to refuse unjustified requests to dismiss a jury.

If the Double Jeopardy Clause applies after the empaneling of the jury but before the commencement of evidence (or, as in this case, even before the opening statements of counsel), it does not necessarily follow that the barriers against termination of the trial and subsequent retrial should be as stringent as they would be at later stages of the trial. The rigors for the accused increase as the trial progresses, and so should the reluctance to permit the prosecution to obtain a termination and retrial. Thus, while an unjustifiable request for mistrial, if resisted by the defendant, should not be tolerated even at the earliest stages following attachment of jeopardy (as in *Downum*, *supra*), dismissal of the jury prior to the evidentiary stage of the trial might be countenanced in appropriate cases for reasons less weighty than "manifest necessity." Where the termination occurs immediately after the swearing of the jury, its propriety should perhaps depend upon the degree to which actual prejudice to the accused is likely in the circumstances of the particular case. See Schulhofer, *Jeopardy and Mistrials*, 125 U. Pa. L. Rev. 449, 512-514 (1977).

535 P. 2d 186, and it had indicated that it was unwilling to do so (see II R. 42).

Appellants seem to contend (Br. 14) that the propriety of dismissing the information is not presented. Because the state courts held that jeopardy had not attached at the first trial, it is true that they never had occasion to decide whether it was proper to terminate that trial. But defendants need not obtain the state courts' opinion on every aspect of a constitutional claim. The duty of defendants is satisfied "once the federal claim has been fairly presented to the state courts" (*Picard* v. *Connor*, 404 U.S. 270, 275).[5] Appellees fairly presented their double jeopardy claim, which was considered and rejected by the Supreme Court of Montana. No more is required.

Although the question whether retrial was proper after the first information had been dismissed (assuming the dismissal came after the attachment of jeopardy) therefore was before the court of appeals, and although appellants state it as a question for this Court (J.S. 5; Br. 3), appellants have not briefed the issues (see Br. 14). Their approach amounts to an abandonment of the question, and we believe that the Court could in this case properly exercise its discretion not to decide an important question that has not been briefed adequately. Compare *I.T.S. Rubber Co.* v. *Essex Rubber Co.*, 272 U.S. 429, 431-432, with *Philbrook* v. *Glodgett*, 421 U.S. 707, 721.

The problems created by the lack of briefing by appellants are compounded by the inadequacy of the record, which does not contain a transcript of the state court proceedings and also lacks many of the pleadings in the state courts. For

[5]See also *Francisco* v. *Gathright*, 419 U.S. 59, 63; *Roberts* v. *LaVallee*, 389 U.S. 40; *Brown* v. *Allen*, 344 U.S. 443, 447-450.

the reasons we discuss below, it may be quite important whether appellees objected to the dismissal of the defective counts of the information and whether they opposed the prosecutor's motion to amend the information. The record is silent on these questions.

If the Court should conclude that the position appellees took in the state court with respect to these questions is important, and if it does not choose to treat the issue as having been abandoned by appellants, then it might be appropriate to vacate the judgment of the court of appeals and remand the case to permit the supplementation of the record. See *Morales* v. *New York*, 396 U.S. 102.

3. We briefly express our views on the retrial question so that the Court, should it decide to reach the question of the propriety of the second trial, will be aware of the considerations indicating that the court of appeals erred in overturning appellees' convictions. Four lines of argument establish the propriety of further proceedings in a case like the present one, and this Court's agreement with any one of them would be sufficient to require reversal of the judgment of the court of appeals.

a. This case is quite similar to *Lee* v. *United States*, No. 76-5187, decided June 13, 1977. In *Lee* the defendant was charged with theft, and he moved after the beginning of his non-jury trial (but before the attachment of jeopardy) to dismiss the information because of a drafting error. The district court took the motion under advisement until it could study the matter, and it proceeded to hear evidence. No one suggested that the information should be amended, although it could have been. After

all of the evidence had been heard, the court dismissed the information because of the defect. Lee then was indicted and retried. This Court held that the Double Jeopardy Clause did not bar the retrial, because the information had been dismissed at the first trial in response to Lee's own motion.

Here, as in *Lee*, the information was dismissed because of a defect that was drawn to the court's attention by the defendants after the start of the trial. Here, as in *Lee*, the trial court dismissed the information in contemplation of a second prosecution on a corrected charge. Here, as in *Lee*, the information could have been amended, but it was not. The only difference between this case and *Lee* that is arguably favorable to appellees is that they moved to "restrict the state's evidence" rather than to dismiss the information. But this motion, in context, was a motion to forbid prosecution altogether and thus to dismiss the information in fact. The technicalities of pleading should not influence the double jeopardy analysis, and the difference between the motion here and the motion in *Lee* is not material.

In this case, as in *Lee* (slip op. 7):

> [T]he only obstacle to a conviction was the fact that the information had been drawn improperly. The error, like any prosecutorial or judicial error that necessitates a mistrial, was one that could be avoided—absent any double jeopardy bar—by beginning anew the prosecution of the defendant. And there can be little doubt that the court granted the motion to dismiss in this case in contemplation of just such a second prosecution. In short, the order entered by the [trial court] was functionally indistinguishable from a declaration of [a] mistrial.

b. It would have been appropriate to terminate the first trial of appellees even if they had objected.[6] In *Illinois* v. *Somerville*, 410 U.S. 458, this Court held that a mistrial could be declared over a defendant's objection when a technical defect in the indictment prevented successful prosecution. In *Somerville*, as in this case, the defect was discovered and the prosecution was terminated after the jury had been sworn but before any evidence had been received. And although the present case involves the dismissal of counts of the information rather than the declaration of a mistrial, "[t]here is no reason to believe that *Somerville* would have been analyzed differently if the trial judge * * * had labeled his action a 'dismissal' rather than a mistrial." *Lee*, *supra*, slip op. 7-8 n. 9.

The court of appeals concluded (J.S. App. 39-40) that *Somerville* did not support the constitutionality of a second trial of appellees because in this case state law would have permitted the correction of the technical defect by amendment of the information. Rev. Codes of Montana § 95-1505(b) (1969 Repl.) provides that a "court may permit any charge to be amended as to form at any time before verdict" if the defendant is not prejudiced; the court of appeals concluded (J. S. App. 40) that "[o]ne can hardly imagine a more 'formal' matter than the correction of a glaring typographical error, and surely no 'rights of the defendant' would have been undercut by the requested alteration.[7]

---

[6]The record does not disclose whether appellees objected to the termination on Count II. See page 9, *supra*. Appellees' petitions for *habeas corpus* do not assert that there was any objection (see A. 16-20), and an objection would have been inconsistent with appellees' previous motions to restrict the prosecution's proof.

[7]The typographical error in the information was "formal," but as a consequence the first proceedings did not involve a charge that appellees committed in 1973 the crime charged in Count II. This

The court of appeals' analysis overlooks the fact that appellees sought to capitalize upon the typographical error by restricting the prosecution's proof. They did not want the information to be amended, and they may have opposed the prosecutor's motion to amend.[8] We submit that, in analyzing whether termination of a trial was manifestly necessary, any alternative course of action objected to by the defendant should be treated as if it did not exist. Cf. *Jeffers* v. *United States*, No. 75-1805, decided June 16, 1977, slip op. 14 (plurality opinion) ("although a defendant is normally entitled to have charges on a greater and a lesser offense resolved in one proceeding, there is no violation of the Double Jeopardy Clause when he elects to have the two offenses tried separately and persuades the trial court to honor his election"). If appellees resisted the trial court's option to permit Count II to be amended, they should not now be heard to contend that the trial court should have allowed the amendment despite their opposition and thereby avoided the need for a second trial. If they exercised their control over the course of the proceedings to prevent the correction of the formal error, then appellees

---

gives rise to the argument, initially made by appellees themselves, that they were not charged with or in jeopardy of conviction concerning any 1973 activity. The second information therefore would not, under this analysis, state the "same offense" as the original Count II, and the basis for appellees' double jeopardy argument would disappear. It would not be consistent for appellees, who argued at the first trial that the information did not charge a 1973 crime, now to argue that they were in jeopardy on the charge that was stated by Count II of the second information.

[8]See page 9, *supra*.

are themselves responsible for the creation of the "manifest necessity" to terminate further proceedings and dismiss the jury.[9]

c. Appellees also exercised considerable control over the course of the proceedings by the timing of their motions. Although they apparently knew about the typographical error in advance of trial, appellees waited until the jury had been sworn before they moved to capitalize upon the defect.[10] In other words, they subjected themselves to a seemingly unnecessary first jeopardy for the purpose of invoking the Double Jeopardy Clause to defeat

---

[9]We doubt, moreover, that either the prosecutor or the court had an obligation to suggest the amendment of the information. Since the right to proceed with a trial that has begun is the defendant's valued right, the obligation to suggest options that would preserve the continuity of proceedings should also rest primarily upon the defendant. In *Lee*, for example, the Court did not think that it was material that the prosecutor could have suggested an amendment to the information but did not do so. If the obligation to suggest and implement means of proceeding with the trial rests upon the court, then it would often be to a defendant's advantage to stand mute even when he knew of a way to avoid an unnecessary termination, since muteness could produce complete immunity from prosecution. A court "[should] not construe the double jeopardy clause so as to permit a defendant who is ready to sacrifice his interest in reaching an existing jury in exchange for a dismissal on double jeopardy grounds to obviate the need for his reaching any jury at all. Such a defendant might be all too willing to sit by silently and refrain from bringing to the trial court's attention alternative solutions. * * * [R]equiring the defendant to assert his right to have his guilt decided by the existing jury will assure that a subsequent double jeopardy dismissal in fact does serve to vindicate the right asserted. * * * Protecting a defendant's interests * * * would be much less a matter of navigating 'a narrow compass between Scylla and Charybdis'. [*Gori* v. *United States*, 367 U.S. 364, 369], if the defendant could be relied upon, and indeed required, to participate in the determination." *United States* v. *Grasso*, 552 F. 2d 46, 56 (C.A. 2) (Timbers, J., dissenting), petn. for a writ of certiorari pending, No. 76-1543.

[10]We do not suggest that counsel had a subjective motivation to manipulate the jeopardy rules, and in our view subjective motivation is irrelevant. For the reasons discussed in the text it is enough that the formal defect in the proceedings could have been, but was not, raised before trial.

any determination of guilt or innocence on the merits. We submit that the Double Jeopardy Clause does not bar dismissal and retrial in such circumstances. See *United States* v. *Kehoe*, 516 F. 2d 78 (C.A. 5), certiorari denied, 424 U.S. 909.

Appellees could and should have drawn the defect to the attention of the court before trial, as Montana law permits and may even require. Rev. Codes of Montana § 95-1702 (1969 Repl.). Pretrial resolution of objections to an indictment or information averts any double jeopardy problem and in most cases any need for two trials. See generally *Serfass* v. *United States*, *supra*.

A defendant who is offered an opportunity to obtain a ruling before trial on legal objections to the prosecution, and who neglects that opportunity, has for all practical purposes surrendered any double jeopardy objection to further proceedings. It is not unfair to hold appellees to this standard in the present case, because they had an ample opportunity to obtain a decision before trial. Cf. *Wainwright* v. *Sykes*, No. 75-1578, decided June 23, 1977.

Whether the making of a belated objection is viewed as a relinquishment of a double jeopardy claim or, perhaps, as a consent to the belated termination of proceedings, a defendant should not be allowed to capitalize upon the rules for the attachment of jeopardy in order to obtain a tactical advantage. There is no reason why a clever defendant should be allowed to transmute a drafting error into immunity from prosecution merely by delay in calling the error to the court's attention. One commentator has expressed the matter well (Note, *Double Jeopardy and Government Appeals in Criminal Cases*, 12 Colum. J. L. & Soc. Probs. 295, 343-344 (1976)):

> When jeopardy attaches only as a result of the defendant's delay, jeopardy could have been completely avoided had the defendant moved to dismiss at the proper time. It [is] thus the defendant who 'effectively (and unnecessarily)' placed himself in jeopardy * * *. * * * [T]he subsequent trial is in effect the * * * only one that the defendant would have undergone, but for his own deliberate choice of dilatory tactics. * * *
>
> The gravamen of this approach is the defendant's voluntary assumption of jeopardy in the proceedings leading to dismissal. * * * The double jeopardy clause's ban on retrials is designed as a brake on state power and as a curb on the number of times the state, with all its resources, can present its proofs in an attempt to convict. It is designed to curb prosecutions at the Government's behest, not prosecutions which, for tactical reasons, the defendant voluntarily chose to undergo and which the defendant could legitimately and easily have avoided. * * * [W]here the defendant allows himself to be placed in jeopardy in order to cut short the prosecution, the Government [should] have one chance at a complete trial * * * .

No legitimate interest of the accused is served by allowing him to accept an unnecessary attachment of jeopardy only to seek to abort the trial. This is particularly true where the prosecution is cut short before any evidence has been introduced. When the prosecution is ended at such an early stage, few of the evils associated with reprosecution can occur. The defendant is not required to sit through two trials; he is not exposed to double expense and discomfiture; the prosecution has not had a dress rehearsal of its case or a preview of

the defense evidence, nor does it enjoy two opportunities to convict, or to do better with a second factfinder after failing with the first; there is little or no potential for manipulation or harassment. In such circumstances retrials should be allowed freely. See *United States* v. *Gentile*, 525 F. 2d 252, 256 n. 2 (C.A. 2), certiorari denied, 425 U.S. 903; Schulhofer, *Jeopardy and Mistrials*, 125 U. Pa. L. Rev. 449, 507-508, 514-517, 520-521 (1977).

d. This Court concluded in *United States* v. *Dinitz*, 424 U.S. 600, 609, that when a trial is aborted before verdict "[t]he important consideration, for purposes of the Double Jeopardy Clause, is that the defendant retain primary control over the course to be followed" in the event of apparent error. In *Dinitz* the Court found that a second trial was permissible because the defendant had exercised his control over the proceedings by requesting a mistrial.

A defendant may exercise control over the course of proceedings both by what he does and by what he does not do. In *Lee*, for example, the defendant exercised both sorts of control: first he requested the dismissal of the indictment, and then, after evidence had been heard at trial, he did not withdraw his request or ask the judge to make a formal finding of guilt or innocence before ruling on his motion to dismiss (*Lee*, *supra*, slip op. 8, 10-11). The Court explained that the trial court in *Lee* had acted reasonably in light of "the last-minute timing of the motion and the failure of counsel to request a continuance" or otherwise object to the dismissal of the information after the hearing of evidence (slip op. 11).

Appellees, too, exercised control both by what they did and by what they did not do. They moved to restrict the proof on Count II of the original information, and

they thus set in motion the events that terminated the trial. They induced the state court to halt proceedings, send the jurors home, and receive briefs on the numerous motions filed immediately after the jury was sworn. Whether or not these actions amounted to a request for or a consent to the termination of the trial—a matter we have discussed at pages 9-16, *supra*—we believe that appellees had an obligation to inform the court if they objected to a termination of proceedings on Count II.

After all, the valued right to receive the verdict of the factfinder at the first trial—the most important double jeopardy interest at stake in cases like the present one—is the defendant's right. Some defendants, like the defendant in *Somerville*, will assert their desire to continue with the trial; others, like the defendant in *Lee*, will be content with a termination; still others, like the defendant in *Dinitz*, unquestionably will prefer a prompt termination to any other option. In an adversary system of criminal justice, the defendant should have some obligation to inform the court whether he desires to proceed with the trial or whether, instead, he is content with a termination when one has been requested by the prosecutor or proposed by the court. At least when the defendant himself is responsible for setting in motion the events that lead to a mid-trial termination, a failure explicitly to object to that termination should be treated as consent.[11]

---

[11]Most courts of appeals have held that, unless the trial court acts so precipitously that the defendant does not have time to decide whether to object, silence in the face of a declaration of a mistrial must be taken as consent. See, *e.g.*, *United States* v. *Gordy*, 526 F. 2d 631, 635 n. 1 (C.A. 5); *United States* v. *Phillips*, 431 F. 2d 949 (C.A. 3); *Roberts* v. *United States*, 477 F. 2d 544,

Nothing in the record of this case indicates that appellees objected to the dismissal of Count II. Because the record does not include a transcript of the state court proceedings, however, it is not possible to say with certainty that they did not object (see page 9, *supra*). We therefore believe that, if the Court should agree with us that the presence or absence of an objection may be controlling, it should vacate the judgment of the court of appeals and remand for further proceedings.

4. The arguments we have made above address the propriety of a trial on Count II of the second information, which corrected the typographical error in the original Count II. The court of appeals also held (J.S. App. 35-36) that the trial on Count I of the second information was improper because it replaced counts that were not defective. The court of appeals held that the trial on the sufficient counts should have proceeded, reasoning that there was no manifest necessity for its termination as to those counts.

As a general rule, a defendant has a substantial interest in proceeding to verdict once jeopardy has attached. But, in determining whether appellees were properly deprived of that interest in this case, the court of appeals did not give adequate attention to the circumstances under which the sufficient counts were dismissed. They were dismissed primarily in order to ensure that appellees would be subjected to only one trial for

---

545-546 (C.A. 8); *United States* v. *Pappas*, 445 F. 2d 1194, 1199-1200 (C.A. 3); *Scott* v. *United States*, 202 F. 2d 354, 355-356 (C.A. D.C.); but see *Himmelfarb* v. *United States*, 175 F. 2d 924, 931 n. 1 (C.A. 9), certiorari denied, 338 U.S. 860. (The discussion in *Himmelfarb* is *dictum;* moreover, it relies upon a view of the role of formal "waiver" in assenting to a mistrial that this Court rejected in *Dinitz*.)

their course of criminal conduct. Count II already had been dismissed as a result of proceedings for which appellees bore much responsibility. Once Count II had been dismissed, it was desirable to dismiss the sufficient counts to vindicate the interest of the public in holding only one trial (with its expense and inconvenience for witnesses) and the interest of appellees in being exposed to only one trial.

All of the counts dealt with crimes committed during a single alleged course of criminal conduct, and a joint trial was therefore appropriate.[12] Unless the technically sufficient counts had been dismissed, there would have been a need to hold two evidentiary hearings rather than one. By dismissing all of the counts, the state court prevented this; appellees were exposed to only a single full trial. The court of appeals' approach would have required the holding of two full trials, and we do not understand why the Double Jeopardy Clause, which was intended to guard against multiple trials, should be interpreted in these circumstances to require multiple trials of defendants who never indicated a desire for such a course of action.[13]

---

[12]At least two Justices would require the prosecution to ensure that all crimes arising out of one course of conduct are tried in a single proceeding. See *Ashe* v. *Swenson*, 397 U.S. 436, 453-454 (Brennan, J., concurring); *Brown* v. *Ohio*, No. 75-6933, decided June 16, 1977 (Brennan, J., concurring). The order dismissing the sufficient counts allowed the filing of a new information and the consolidation in a single trial of all of the pertinent charges.

[13]In *Jeffers* v. *United States*, *supra*, four Justices concluded that the federal courts should ensure that only a single trial is held on charges involving a greater and a lesser offense even if the accused resists a joint trial. See dissenting slip op. 1-3. The dismissal of the sufficient counts here enabled appellees to be tried in but a single proceeding. Whether the court could properly have overridden an objection by appellees to dismissing the information in order to hold a single trial (cf. slip op. 1 n. 3) need not be considered, since the record does not indicate whether appellees objected to the dismissal of the sufficient counts.

CONCLUSION

The United States takes no position with respect to the time of attachment of jeopardy in this case. If the Court accepts appellants' arguments concerning the attachment of jeopardy, it should reverse the judgment of the court of appeals. If it rejects these arguments, and in addition concludes that appellants have abandoned their position concerning the propriety of a second trial, then it should affirm the judgment of the court of appeals without considering the arguments presented in this memorandum. If it concludes that these arguments are open, however, then it either should reverse the judgment of the court of appeals for the reasons we have discussed or vacate the judgment of that court and remand for supplementation of the record.[14]

Respectfully submitted.

WADE H. MCCREE, JR.,
Solicitor General.

BENJAMIN R. CIVILETTI,
Assistant Attorney General.

FRANK H. EASTERBROOK,
Assistant to the Solicitor General.

JULY 1977.

---

[14]In any event, the case has become moot with respect to appellee Cline (see note 2, *supra*); the judgment should be vacated with respect to him and the case should be remanded with instructions to dismiss. See *Weinstein* v. *Bradford*, 423 U.S. 147.

DOJ-1977-07